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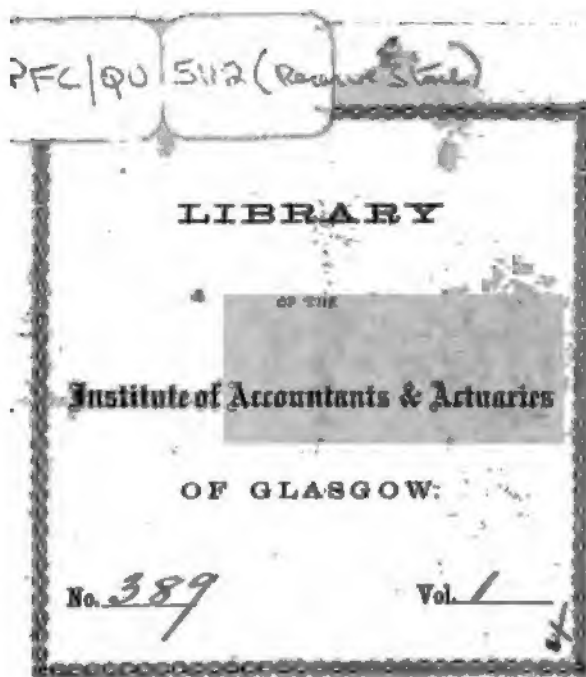
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OBSERVATIONS
ON THE
LAW AND PRACTICE
IN REGARD TO
MUNICIPAL ELECTIONS
AND THE
CONDUCT OF THE BUSINESS OF TOWN COUNCILS
AND COMMISSIONERS OF POLICE
IN SCOTLAND

BY
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WILLIAM BLACKWOOD AND SONS
EDINBURGH AND LONDON
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P R E F A C E.

IN the following pages I have endeavoured to provide, for those engaged in the conduct of municipal elections in Scotland, a handbook, which shall not only meet to some extent the need for a consolidation of the existing laws on that subject, but lead to greater uniformity of practice than has hitherto prevailed.

A few weeks after the passing of the Ballot Act, in July 1872, a meeting of the town-clerks of Scotland was held in Edinburgh to consider the provisions of that Act, and to arrange a uniform course of action with reference to it. A small committee was then appointed to obtain the opinion of eminent counsel on points of difficulty, and to prepare an analysis of the several acts relating to municipal elections, with forms applicable to the various steps of procedure. The duty thus remitted to them the committee devolved upon me as its convener, and a work, entitled "An Analysis of the Ballot Act, and of the several Municipal Election Statutes," was hurriedly prepared during the months of September and October. Proof sheets of the work, containing

an annotated edition of all the municipal election statutes, and instructions for the guidance of presiding officers, were forthwith furnished to the several town clerks previous to the elections of that year. The Edinburgh Municipal Election of 1872—which was keenly contested and scrutinized—was carried out in strict accordance with the recommendations in the proof sheets, so that every detail was, practically tested by myself. Subsequently, the committee of sheriffs on parliamentary elections adopted for these elections, with only one or two alterations, the instructions to presiding officers which had been prepared for municipal elections. Immediate requirements having been thus met, I was urged by many of the friends at whose request the work was first undertaken, to extend its scope, and to deal with the law and practice of town councils and commissioners of police in regard to several collateral matters. I agreed to do so, anticipating no longer delay than would admit of my getting the benefit of the experience of another election in applying the provisions of the Ballot Act. This was afforded, in March 1873, by the first School Board election in Edinburgh,¹ the conduct of which I

¹ The Rules and Directions for the First Election of School Boards in Burghs in Scotland appointed the votes of the electors to be taken in the same manner as a poll at a contested municipal election; and applied the provisions of the Ballot Act to School Board elections,—substituting the term “School Board Election” for the term “Municipal Election.”

undertook as returning officer. My removal to Glasgow in the following month, and the engrossing duties and responsibilities of official life here, have prevented my giving to the completion of this work more than distracted attention at wide intervals of short leisure.

I am so conscious of the shortcomings of my work, that my engagements to others have alone prevented my abandoning its publication. As it goes forth, I can only hope that it will be judged, not as a legal treatise—to which it has not, and never was intended to have, any pretensions—but simply as a series of practical observations, designed to assist those who may have had fewer opportunities than I have had of becoming acquainted with the working of our municipal system. I would also indulge the hope that the disadvantages attendant upon distracted work, extended over so long a period, may be to some extent compensated by the increased experience gained in conducting the Glasgow municipal elections of the last six years, and by having been called on frequently during that time to consider many questions connected with similar elections in other burghs.

In the observations on the miscellaneous rights, duties, and liabilities of magistrates, councillors, and commissioners of police, I have, in compliance with the suggestions of several friends, gone somewhat

beyond what I originally designed to be the scope of my work, and have alluded to the tenure of office of town-clerks and clerks of commissioners of police; to the responsibility which attaches to corporate and trust funds for the actings of magistrates, councillors, and statutory trustees; to the nature of the common good of burghs, and the powers of magistrates and councils in dealing with it; and to the general principles which apply to public trustees in the administration of the trust funds under their charge. I have also ventured, in conclusion, to offer some observations as to the general rules to be observed in the transaction of business by public bodies.

I have endeavoured to utilize important decisions, down to the latest date, by the English and Irish Courts, as well as by the Court of Session, on the various questions alluded to in the work. In referring to the more important of these decisions, I have frequently quoted, sometimes *in extenso*, the opinions of the eminent judges by whom the judgments were delivered. This would have been unnecessary in a work intended for lawyers enjoying ready access to the law reports, but will, I hope, prove useful to many of those for whom this book is designed.

When some of the earlier sheets were printed off Lord Young was Lord Advocate, and Lord Rutherford Clark Dean of Faculty. Mr. Watson, then

Solicitor-General, has since been also Dean of Faculty, and is now Lord Advocate. These changes explain the differences in the manner of referring throughout the work to these eminent counsel.

As my experience has been mainly connected with Edinburgh and Glasgow,¹ I speak with most confidence as to elections in royal burghs. But the Ballot Act and the Municipal Elections Amendment (Scotland) Acts 1868 and 1870, have done much to assimilate the practice of parliamentary burghs to that of royal burghs; and the Observations in regard to the latter will be found applicable in great measure to parliamentary burghs, and even to burghs of regality and barony, as well as to populous places which have adopted the General Police Act of 1850 or 1862 and are known as "Police Burghs."

Where cases have been decided, or important points have come specially under my observation during the protracted progress of the work through the press, but too late to be noticed in the body of the work, I have referred to them in the Additions and Corrections, and have numbered each paragraph so as to facilitate reference. The Appendix, it may be stated (with the exception of Nos. XIIA., XIVA., XIVB., XIVC., and

¹ The city of Edinburgh is divided into thirteen wards, and its municipal constituency for the year 1878-9 numbers 28,342 electors. The city of Glasgow is divided into sixteen wards, and its municipal constituency for the same year numbers 63,777 electors.

XIV^D.), was printed off in 1874, and is paged separately, within brackets.

The Index has been compiled with a view to overcome, as far as possible, the inconvenience which might otherwise be experienced in referring, under the pressure of election arrangements, to what is to be found on the same subjects in different portions of the work. It will obviate, I trust, for practical purposes, those defects of arrangement which are due to the circumstances under which the work has been prepared.

I have to acknowledge the ready courtesy with which I have invariably been furnished with copies of the opinions referred to or quoted in the work, by the town-clerks and others in whose custody they were.

To Mr. Andrew Mure, M.A., Advocate, Edinburgh, lately Sheriff-Substitute of Shetland, who has kindly read over the proof sheets of the Observations, and verified most of the references, I am indebted for valuable suggestions, of which I am sorry to think I have been able to avail myself so imperfectly.

J. D. MARWICK.

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A B B R E V I A T I O N S.

The Reform Act of 1832, denotes the Act 2 and 3 *William IV.*, cap. 65, intituled “An Act to Amend the Representation of the People in Scotland” [17th July 1832].

The Reform Act of 1868, or The Representation of the People (Scotland) Act, 1868, denotes the Act 31 and 32 *Victoria*, cap. 48, intituled “An Act for the Amendment of the Representation of the People in Scotland” [13th July 1868].

The Burgh Reform Act denotes the Act 3 and 4 *William IV.*, cap. 76, intituled “An Act to Alter and Amend the Laws for the Election of the Magistrates and Councils of the Royal Burghs in Scotland” [28th August 1833].

The Burgh Voter's Act denotes the Act 19 and 20 *Victoria*, cap. 58, intituled “An Act to Amend the Law for the Registration of Persons entitled to Vote in the Election of Members to serve in Parliament for Burghs in Scotland” [21st July 1856].

The Registration Acts denote (1) *The Burgh Voter's Act* above referred to ; (2) *The 8th Section of the Act 20 and 21 Victoria*, cap. 70, intituled “An Act to Provide for the Extension of the Boundaries of Burghs in Scotland, and to remove doubts as to the right of certain Persons holding offices to be Registered as Voters for Municipal Purposes” [25th August 1857], as amended by the Reform Act of 1868 ; and (3) every other Act relating to the Registration of Persons entitled to Vote at the Election of Members to serve in Parliament for Burghs in Scotland which may be in force at the time.

The Municipal Elections Amendment (Scotland) Act, 1868, or The Election Act of 1868, denotes the Act 31 and 32 *Victoria*, cap. 108, intituled “An Act to amend the Laws for the Election of the Magistrates and Councils of Royal and Parliamentary Burghs in Scotland” [31st July 1868].

The Municipal Elections Amendment (Scotland) Act, 1870, or The Election Act of 1870, denotes the Act 33 and 34 *Victoria*, cap. 92, intituled “An Act to amend the Laws for the Election of the Magistrates and Councillors of Royal and Parliamentary Burghs in Scotland” [9th August 1870].

The General Police Act of 1850 denotes the Act 13 and 14 *Victoria*, cap. 33, intituled “An Act to make more effectual Provision for Regulating the Police of Towns and populous Places in Scotland, and for paving, draining, cleansing, lighting, and improving the same” [15th July 1850].

The General Police and Improvement (Scotland) Act, 1862, or **The General Police Act, 1862**, denotes the Act 25 *and* 26 *Victoria*, *ap.* 101, intituled “An Act to make more effectual Provision for Regulating the Police of Towns and populous Places in Scotland, and for lighting, cleansing, paving, draining, supplying Water to and improving the same, and also for promoting the Public Health thereof” [7th August 1862].

The General Police Amendment Act, 1868, or **The General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1868**, denotes the Act 31 *and* 32 *Victoria*, *cap.* 102, intituled “An Act to Alter the Qualifications of the Electors in places in Scotland under the ‘General Police and Improvement (Scotland) Act, 1862,’ or under the Act 13 and 14 *Victoria*, chapter 33, and to amend the said Acts in certain other respects” [31st July 1868].

The Ballot Act, 1872, or **The Ballot Act**, denotes the Act 35 *and* 36 *Victoria*, *cap.* 33, intituled “An Act to amend the Law relating to Procedure at Parliamentary and Municipal Elections” [18th July 1872].

The Burgesses (Scotland) Act, 1876, denotes the Act 39 *Victoria*, *cap.* 12, intituled “An Act to Assimilate the Law of Scotland to that of England respecting the creation of Burgesses” [1st June 1876].

The Burghs (Division into Wards) Amendment Act, 1876, denotes the Act 39 *and* 40 *Victoria*, *cap.* 25, intituled “An Act to Amend the Law in Scotland in regard to the Division of Burghs into Wards” [13th July 1876].

The General Police Amendment Act 1877, denotes the Act 40 *and* 41 *Victoria*, *cap.* 22, intituled “An Act to Amend the General Police and Improvement (Scotland) Act, 1862” [12th July 1877].

The General Police Amendment Act, 1878, denotes the Act 41 *and* 42 *Victoria*, *cap.* 30, intituled “An Act to Alter the Law of electing Commissioners under the General Police and Improvement (Scotland) Act, 1862” [22d July 1878].

MEANING OF TERMS.

The term “Polling Place” means the particular place in the burgh, if not divided into wards, or the particular place in the ward, if the burgh be divided into wards, which may be fixed on by the returning officer, as that at which the electors of the burgh or ward respectively are to poll.

The term “Polling Station” means the separate room or booth under the control of a presiding officer.

The term “Compartment” means the space partitioned off in each polling station for the use of the voters when marking their ballot papers, so as to secure them from observation.

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ADDITIONS AND CORRECTIONS.

(1.) Page 4.—Between lines 33 and 34 insert the following note:—

See note 2*b*, Additions and Corrections, No. (15).

(2.) Page 4.—Between lines 37 and 38 insert the following note:—

See also sections 11, 12, 13, and 14 of The General Police and Improvement (Scotland) Act, 1862, which provides for the extension of the boundaries of royal burghs in which the Act has been adopted in whole or in part to the parliamentary boundaries of such burgh, or to any part thereof. When such extension is made, the parliamentary boundaries of the burgh are declared, by section 13, to be thereafter “the boundaries of the royal burgh for all municipal purposes, and all matters connected with police, including the right of voting for town councillors.”

(3.) Page 6, line 33, after “roll” insert “².”

At the bottom of the page insert the following note:—

² Section 34 of the Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict., cap. 91), provides that “In all questions and proceedings under any Act of Parliament relating to the franchise, or to the representation of the people in Parliament, it shall be sufficient to refer to an entry in the Valuation Roll in force for the time, or last in force under this Act in any county or burgh, and such entry shall be received and taken in all such questions and proceedings as conclusive proof that the gross yearly rent or value of the lands or heritages specified therein is, at the date of such reference, and has been from the commencement of the year to which such Valuation Roll applies, of the amount therein set forth.”

(4.) Page 10, line 18, after “Dundee” insert “Renfrew.”

(5.) Page 14, line 19, after “election” insert “^{1a}.”

Between lines 32 and 33 insert the following note:—

See notes 2*b* and 2*c*, Additions and Corrections, No. (15).

(6.) Page 19, line 17, delete “re-division” and substitute “re-arrangement.”

(7.) Page 20, line 12, after "act" insert :—amended by section 3 of the Act 39 and 40 Vict., cap. 25.

(8.) Page 20, line 14, delete "ten" and substitute "five."

(9.) Page 21, line 17, after "burgh" insert "1."

(10.) Page 21, at the bottom of the page, insert the following note:—

¹ The Burghs (Division into Wards) (Scotland) Amendment Act, 1876 (39 and 40 Vict., cap. 25) extends the provisions of section 17 of The Municipal Elections Amendment (Scotland) Act, 1868, by enacting that the section shall be read and construed as if for the words 'ten thousand' therein, the words 'five thousand' were substituted. [Section 3.] The Act of 1876 is farther appointed to be read and construed with the Act of 1868. [Section 2.]

(11.) Page 22, line 17, delete "ten" and substitute "five."

(12.) Page 22, last line, after "section 6," insert :—as amended by the Burghs (Division into Wards) (Scotland) Amendment Act, 1876 (39 and 40 Vict., cap. 25). [Section 3.]

(13.) Page 23, line 8, after "burgh" insert "5."

(14.) Page 23, line 10, after "Residence" insert "6."

(15.) Page 23, between lines 29 and 30, insert the following notes:—

2^a. A. occupied as joint tenant along with his son the glebe of the minister of Kinghorn, and other lands, all of which were held by burgage tenure. A. was elected a councillor of the burgh of Kinghorn in 1868, but his election was objected to on the ground that he neither resided nor carried on business within the burgh. The objection was referred to the then Lord Advocate (Gordon), who returned the following opinion :—"I am of opinion that if the land, part of the glebe, farmed by [A.] is within the royalty (which I presume it to be, as it is held burgage), he is eligible as a councillor of the burgh."

2^b. As to whether a person who is a pensioner or paid officer of a corporation is eligible for election as a councillor of a royal burgh, see footnotes pp. 3 and 4, and No. 12 of these Observations.

2^c. In November 1877, the writer consulted the Lord Advocate (Watson) and Mr. J. Badenach Nicolson on the following question :—Is the fact of an elector being a pensioner of any corporation within the city, or being an official or servant of the town, or being appointed by the Council and paid any fees or salary out of an assessment levied by the Town Council, or holding any remunerated office subject to the supervision of the Council, a ground under the statute, or at common law, of ineligibility either as councillor or magistrate? To that query they replied

as follows :—“ We are of opinion that none of the circumstances referred to in this query,—except tenure of offices the holders of which are by express statutory enactment debarred from exercising the municipal franchise, *e.g.*, town clerks and depute town clerks, and burgh assessors under the Valuation and Registration Acts,—would constitute a ground of ineligibility for either of the offices of councillor, magistrate, or river bailie. Subject to the exception just mentioned, none of these circumstances would afford any ground for striking an elector off the municipal roll, and the statutes appear to us to render identical the qualifications for voting for, and being elected as, councillor or magistrate of a burgh. In the special case referred to in the memorial, seeing that there is no express enactment directed against the election to the office of councillor or magistrate of a person holding the appointment of registrar of births, etc., we do not think that such person would be disqualified from election as a councillor or magistrate ; and we are farther of opinion that his election to the office of councillor or magistrate would not be incompatible with his continuing to perform the functions of registrar.”

(16.) Page 23, at the bottom of the page, insert the following notes :—

⁵ See footnotes pp. 1, 2, 3, and 4, and notes 2^b and 2^c, Additions and Corrections, No. (15).

⁶ As to what constitutes residence in the sense of the acts, see Cay on Election Law, p. 431, *et seq.* ; Nicolson on the Law of Election and Registration (2d ed.), pp. 111-114 ; Rogers on Elections and Registration (12th ed.), pp. 106-110.

See also the cases of the Queen *v.* the Overseers of Norwood, 14th May 1867, L.R. 2, Q. B. p. 457, and the Oldham Borough Election Case, 16th March 1869 ; O'Malley and Hardcastle's Reports, Vol. I., p. 158. In both of these cases it was held that a man's residence is where he habitually sleeps.

See also the Borough of Northallerton, 12th April 1869, O'M. & H., Vol. I., p. 170. The Borough of Bewdley, 27th April 1869, O'M. & H., Vol. I., p. 175.

(17.) Page 26, line 34, after “ section 33 ” insert :—
and the General Police and Improvement (Scotland) Act, 1862, section 50. This section was repealed by schedule fifth of the Ballot Act in so far as the provisions of the section were inconsistent with that act.

Sections 50 and 51 of the Act of 1862 are repealed by section 2 of the General Police and Improvement (Scotland) Amendment Act, 1878, and sections 3 and 4 of the latter act are substituted. By section 3, one-third of the commissioners, or, where the burgh is divided into wards, one-third of the commissioners for each ward, is appointed to go annually out of office on the first Tuesday of

November in each year, and on the same day the places of the commissioners going out of office are appointed to be supplied by an equal number of new commissioners. When, however, the first election of commissioners takes place on or after the first day of May in any year, no commissioner goes out of office, and no second election of commissioners takes place until the first Tuesday in November in the year succeeding that in which the first election took place. No commissioner or magistrate of police in office at the passing of the act (on 22d July 1878) goes out of office until the first Tuesday of November following.

(18.) Page 27; line 5, after "office" insert:—When, at any annual election, commissioners receive an equal number of votes, the remaining commissioners decide, at a meeting convened for the purpose, the order in which they must go out of office.⁸

(19.) Page 27, at the bottom of the page, insert the following note:—

⁸ See section 51 of the General Police Act, 1862. This section is repealed by section 2 of the General Police and Improvement (Scotland) Amendment Act, 1878, and section 4 of the latter act is substituted.

(20.) Page 29, at the bottom of the page, add the following paragraph to footnote ¹:—

The law as stated in the text with reference to burghs and places which have adopted the General Police Act of 1862, is altered by the General Police and Improvement (Scotland) Amendment Act, 1878. By section 2 of the latter act, sections 50 and 51 of the act of 1862 are repealed, and sections 3 and 4 of the act of 1878 are substituted. Section 3 enacts that all annual elections of commissioners after the first, shall take place on the first Tuesday of November in each year. Elections of commissioners under the General Police Act of 1850 are not affected by the act of 1878.

(21.) Page 30, between lines 7 and 8, insert the following paragraph:—

The provisions of the General Police Act of 1862, under which the annual election of the retiring third of the commissioners took place, as above explained, were repealed by "The General Police and Improvement (Scotland) Amendment Act, 1878." The latter act enacts that the retiring third shall go out of office and new commissioners be elected on the first Tuesday of November annually, and that when the first election of commissioners takes place on or after the first day of May in any year, no commissioner shall go out of office, and no second election of commissioners shall take place until the first Tuesday in November of the year succeeding that in which the first election took place.

(22.) Page 36, between lines 37 and 38, insert :—

See No. 45 of these Observations.

(23.) Page 38, line 16, after “resigned,” insert ⁴.

(24.) Page 38, between lines 31 and 32, insert the following note :—

By the English Municipal Elections Act, 1875 (38 and 39 Vict., cap. 40), it is provided that *nine days at least* before any election of town councillors the town clerk shall publish a notice intimating the last day on which nomination papers are to be delivered to him, which day is to be *seven days at least* before the election, and the day and hour at which the mayor will attend to hear and determine objections thereto [section 1, sub-sections 1, 2, and 3] ; Sundays are excluded from computation by section 11. The seven days must therefore be seven clear days. [Zouch v. Empsey, 2d June 1821, 4 Barnewall and Alderson, K. B., 522.] It was held by the Court of Common Pleas in England, in the case of Howes v. Turner, 8th May, 1876 [1 C. P. D., 670-682], that a notice published by the town clerk erroneously stating that the last day for delivery of nomination papers was Saturday, 23d October, instead of Friday, 22d October, was calculated to mislead the candidates, one of whom only lodged his nomination paper on the 23d of October, and so prevented a fair election. The whole proceedings were therefore declared void, and a new election was ordered.

(25.) Page 38, last line, delete “180,” and substitute “178 and 179.”

(26.) Page 38, at the bottom of the page, insert the following note :—

See note 1, Additions and Corrections, No. (119).

(27.) Page 44, line 4, after “burgh” insert °.

(28.) Page 44, immediately above footnote 1, insert the following note :—

° May a registered elector be one of the two electors who proposes himself? There seems to be nothing to prevent him. In England the Act 22 Vict., cap. 35, section 6, expressly authorised “any person entitled to vote” to nominate himself for the office of councillor, if duly qualified. It has also been held that a candidate may vote for himself in a parliamentary election. Harwich, 31st March 1803, Peckwell’s Election Cases, 383. Rogers on Elections and Registration (12th ed.), p. 210.

(29.) Page 47, line 19, after “seconders” insert °.

(30.) Page 47, immediately above footnote 1, insert the following note :—

° While the nominations of candidates must be made in the form prescribed by statute, “or as near thereto as circumstances

will admit," the statutory form specifically requires that the "names and places of abode" of the proposers and candidate shall be inserted in the nomination paper, "as in the municipal register of the burgh." Unless, therefore, the name and place of abode be erroneously entered in any case in the municipal register, no circumstances can well be conceived in which a departure from the most literal adherence to the statutory form is excusable.

To show how the corresponding enactments in statutes applicable to English municipal elections are construed by the English courts, reference may be made to the following cases, decided under The Municipal Elections Act, 1875 (38 and 39 Vict., c. 40). That statute requires the "names, abode, and description of the candidate" to be stated in the nomination paper. The paper is also appointed to be signed by the proposer, seconder, and eight other burgesses, and it is directed "that the number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled in the burgess roll, shall be stated." In *Mather v. Brown*, 5th May 1876, 1 C. P. D., 596, it was held that a nomination paper was void in which only the initial letter of one of the Christian names of a candidate was inserted. In the case of *Soper v. the Mayor of Basingstoke*, 23d April 1877, 2 C. P. D., 440, the seconder of a candidate was described in the nomination paper as of H. Street, while the situation of the property of the seconder was described on the burgess roll as being in W. Street. The street was generally known as H. Street, and its name had been only recently changed to W. Street; no one had been or could be misled by the description thereof as H. Street. The mayor having declared the nomination paper to be void, on the ground that the seconder had improperly described the situation of the property in respect of which he was enrolled on the burgess roll, it was held that the situation of the property was sufficiently described, and that such sufficient description, and not the description of the property upon the burgess roll, was what the statute required to be set forth on the nomination paper. The decision of the mayor was, therefore, reversed. In deciding that case, Mr. Justice Denman said, "The case which has been most strongly relied upon by the respondent's counsel is *Mather v. Brown* [*ut supra*], but I think that case not against the petitioner; there the misdescription consisted of stating one of the Christian names of a candidate by the initial letter only; this was held to be such a misnomer as to render the nomination paper void. That case seems to me widely different from the present, for the statute requires the Christian and surname of the candidate to be stated in the nomination paper, but it only directs that the situation of the property of the proposer and seconder shall be set forth, . . . and there seems to be a good reason for the distinction, because it often happens that the name of a street is changed, but a man seldom changes his name,

and he cannot be said to have two names at the same time. The situation of the property belonging to the petitioner's seconder was properly stated to be in High Street, because every inhabitant of the borough would be able to recognise it under that description."

As to whether, in the event of a proposer or seconder or candidate being erroneously named or described in the municipal register, the insertion in the nomination paper of the correct name and description would invalidate the paper, reference may be made to *Knowles v. Brooking*, 23d February 1846, 2 C.B., 226; 15 L.J. (C.P.), 197; and *Melbourne v. Greenfield*, 16th November 1859, 7 C.B. (N.S.), 1; 29 L.J. (C.P.), 81; *Calver v. Roberts*, 17th November 1871, 25 L.T., 751.

(31.) Page 48, line 26, after "determined" insert ³.

(32.) Page 48, at the bottom of the page, insert the following note :—

³ The [English] Municipal Elections Act, 1875 (38 and 39 Vict., c. 40), section 1, sub-section 3, provides that the mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk, between the hours of two and four o'clock in the afternoon, and shall decide on the validity of every objection made in writing to a nomination paper. The decision of the mayor, which shall also be given in writing, shall, if disallowing any objection to a nomination paper, be final, but if allowing the same, shall be subject to reversal on petition questioning the election or return. In the case of *Howes v. Turner*, 8th May 1876 [1 C. P. D., 670], the town clerk had issued a bad notice as to the time at which nomination papers must be lodged, and nominations were lodged accordingly after the proper time at which they should have been lodged. Objections to these nominations were disallowed by the mayor, and it was pleaded that his decision was final. The Court of Common Pleas, however, held that the mayor had no power to deal with the objection as to the time of delivering the nomination papers, and that his decision might be questioned on petition. On this point Mr. Justice Brett said,—"It seems to me that the only office of the mayor is to decide objections to the paper itself, and that his decision as to such objections only is final, and therefore, that this question is still open to us." Mr. Justice Denman said,—“As to the power of the mayor, I agree with my brother Brett that sub-section 3 of section 1 of 38 and 39 Vict., c. 40, was not intended to give the mayor power to dispense with the statutory day for the delivery of nomination papers. A mistake in the notice in that respect was beyond his power to cure; and it follows that, if the mayor has no power to give a final decision on that, it must be for the

court." Mr. Justice Archibald said,—“I agree with my brother Brett that the mayor had power only to decide upon the form of the nomination papers, and not as to the qualifications of the candidates.” [1 C. P. D., 678, 680, 681. See note, Additions and Corrections, No. (24).]

See the opinion of the Lord President (Inglis) in deciding the case of M'Donald and Others v. Robertson, quoted in footnote, p. 229.

In November 1877, the writer consulted the Lord Advocate (Watson) and Mr. J. Badenach Nicolson on the subject, and asked them the following question: “Has the memorialist or town clerk any power, and if so, to what extent, to judge of the validity of nominations and the eligibility of candidates for the office of town councillor? Would he, for example, be entitled or bound to reject the nomination of a person who had no residence within the burgh or within seven miles of it, or who had been sequestrated and was still undischarged, or was subject to some legal incapacity, or was otherwise ineligible for the office of councillor?” To that query the following answer was returned:—

“Cases may occur in which it will be plainly within the competency of a town clerk to reject a nomination for the office of councillor. But we could not advise him to exercise that power, except in cases where the objection is *obviously* well-founded, and is either patent on the face of the nomination paper, or capable of instant verification. The objections to a nomination may be conveniently classed under two heads, according as they regard—(1) the form or contents of the nomination paper; or (2) the eligibility of the candidate nominated. As to objections of the first class, we are of opinion that if the form and contents of a nomination paper were defective in respect of the requirements of the Municipal Elections Amendment (Scotland) Act, 1868, as modified by the Ballot Act, it would be the duty of the town clerk to reject it. If, for instance, the name and abode of the candidate, as given in the nomination paper, were not to be found in the roll of electors, it would be the duty of the town clerk to reject the nomination. Again, if the paper were subscribed by one proposer only, it plainly ought not to be received.

“As to objections of the second class, affecting the eligibility of the candidate, we do not doubt, as already stated, that the town clerk might reject the nomination of any person to whom a statutory disqualification is attached, *e.g.*, the holder of a disqualifying office or a person convicted of bribery, under 17 and 18 Vict., c. 102, sec. 6, and 31 and 32 Vict., c. 125, secs. 43, 45. Other cases may be figured which would be attended with more difficulty. For instance, we could not advise the memorialist that as town clerk he would be entitled to judge of the *mental incapacity* of a candidate. Neither do we think that he could reject the nomination of a person whose name

appeared on the register as resident within the burgh, or within seven miles of it, on the ground that he had reason to believe that such person had ceased to be so resident. The case of sequestration raises a question of peculiar difficulty. Sequestration being a judicial act, would, we think, have been unquestionably a good ground of objection, were it not necessary to consider the effect of the provision in 31 and 32 Vict., c. 108, sec. 8, as to the conclusive evidence afforded by the municipal register, that the persons therein named continue to have the qualifications annexed to their names. We have very carefully considered the matter, but although we are fully sensible of the disadvantage resulting to a burgh from the election of a bankrupt to municipal office, we are unable to come to the conclusion that a bankrupt is disqualified from exercising the municipal franchise, or being elected to a municipal office, so long as his name appears upon the municipal register.

“Generally, our advice to the memorialist is, that whilst in very plain cases he would be entitled to reject nomination papers, he ought to exercise extreme caution in doing so. It appears to us on the whole that less practical inconvenience is likely to arise from the admission than from the rejection of doubtful nomination papers.”

(33.) Page 52, line 5, after “responsibility” insert ^o.

(34.) Page 52, immediately above footnote 1, insert the following note :—

^o In November 1877, the writer consulted the Lord Advocate (Watson) and Mr. J. B. Nicolson, as to whether he was at liberty to allow any nomination which had been duly made to be withdrawn? Their opinion was as follows :—“We are of opinion that a nomination once legally made cannot be withdrawn. The nomination of a candidate is a public act, concerning not merely the candidate, but the constituency, who are entitled to rely upon it as giving them an opportunity of recording their votes at the election. It is true the Ballot Act, sec. 1, permits the withdrawal of a candidate at a Parliamentary election. But in the first place, such withdrawal must, to be effectual, take place ‘during the time appointed for the election, but not afterwards,’ so that a fresh nomination may be made in room of the one withdrawn; and in the second place, it is clear that the provision of the Ballot Act just mentioned does not apply to a municipal election, which, except in regard to the form of the nomination papers (Ballot Act, second schedule), and the mode of taking the poll, is to be conducted ‘in the manner in which it would have been conducted if this Act had not been passed’ (Ballot Act, sec. 20). It is, of course, open to a candidate who does not wish to press his candidature

to make known to the electors by advertisement or placards that he does not longer desire the electors to record their votes in his favour."

(35.) Page 53, line 36, delete "and 180," and substitute "178 and 179."

(36.) Page 55, line 19, after "Guthrie" insert—

Should the provost or senior magistrate acting as returning officer die during an election, or be prevented by indisposition, or other necessary cause, from completing it, the magistrate next in seniority should undertake the duties remaining to be performed. The necessities of the case, for which no statutory provision has been made, seem to call for such action.²

(37.) Page 55, after footnote 1, insert the following note:—

² In the case of *Ogilvie v. Guthrie*, the 5th section of the Act 15 and 16 Victoria, cap. 32, received a liberal interpretation from the Court, who explained that the true test of the application of the act was not necessarily the retirement of all the magistrates from the council, but the entire cessation of their magisterial powers. It appears, however, to the writer, that the object of the legislature was to provide a remedy for the case of there being no magistrate in a position to act, and that equally happens when no magistrate is able to perform the duties of the office, as when every magistrate is included in the retiring third. The latter event is, nevertheless, the only one for which the statute expressly provides, and if it was justifiable, *ex necessitate rei*, to extend the provision further, as was done in the case of *Guthrie*, the retirement from the council of some of the magistrates, and the inability of the others to perform their duties, seem to justify the extension of the statute to such a case. The point is attended with so much doubt, however, that if the magistrates who remain in office, but are unable to act, can be induced to resign as magistrates in time for their resignation receiving effect before the annual election, they should be asked to do so. In the event of their complying, the Act 15 and 16 Vict., cap. 32, would come into operation, and after the election is completed, the magistrates who had so resigned might be re-elected. If there be no time for this, but still sufficient time to apply to the Court of Session for the appointment of managers to conduct the election, it will be prudent to adopt that course,—for which there is a precedent in the case of the Provost and Magistrates of Dunfermline, 3d November 1877; Scot. Law Rep., Vol. XV., p. 31. 5 Rettie, p. 47.

The provost and three of the four magistrates of Dunfermline were included in the third of the council who fell to retire in November 1877. The only remaining magistrate was in a state of health which rendered it impossible for him to perform the

duties of returning officer. In these circumstances the magistrates and town clerk consulted the Lord Advocate (Watson) as to whether the provisions of section 5 of the Act 15 and 16 Vict., cap. 32, did not apply to the effect of entitling the provost to act in the same way as if all the magistrates were among the third of the council going out of office. His Lordship returned the following opinion:—"I am of opinion that the circumstances assumed as the basis of this query do not bring the case within the provisions of section 5 of the Act 15 and 16 Vict., cap. 32. In the case of *Ogilvy v. Guthrie*, the judges of the First Division adopted a very liberal interpretation of the language of that clause; but at the same time they explained the true test of its application to be—not necessarily the retirement of all the magistrates from the council, but the entire cessation of their magisterial powers. It appears to me to be impossible, consistently with the principles recognised in that case, to hold that the indisposition, or it might be the temporary absence, of a magistrate, is equivalent to a cessation of the magisterial powers, within the meaning of the statute of 1852." He further said, "The simplest way of escape from the difficulty, in my opinion, would be this, that the only magistrate remaining in the council should at once resign his magisterial office. This would bring the provisions of section 5 into play; and probably the new council would have no difficulty in re-electing the magistrate in question to the office which he had resigned in order to save trouble and expense. Failing such an arrangement, I can only suggest an application to the Court of Session for the appointment of managers to conduct the election." There was not time for the suggested resignation taking effect, under section 26 of 3 and 4 Will. IV., cap. 76, before the annual election. A petition was accordingly presented to the court by the provost and all the bailies on 1st November, praying that they might be authorised and appointed to retain and continue to exercise all the powers and functions of their several offices until the election and coming into office of their successors, to the same effect as if the whole magistracy fell to go out of office as councillors on the 6th of November 1877, but so that they should not, on and after that date, be entitled to act or vote as councillors, except in the case of their re-election as councillors; and in particular to authorise and appoint the provost, whom failing the three bailies who fell to retire respectively in their order, to act as returning-officer at the election of councillors, to superintend the poll and otherwise conduct the election, with all the powers, rights, and functions competent to the bailie who remained in office, but was unable to act, until the coming into office of the new councillors; and, further, to authorise and empower the provost, whom failing the three retiring bailies, respectively in their order, at the first meeting of the council after the election, but before the election of the

provost and magistrates, to attend and preside thereat until the meeting should have elected the provost and magistrates respectively, and no longer : But declaring that the provost and three retiring bailies should have no deliberative vote in such meetings, unless in the case of their re-election as councillors, but should in case of equality of votes have a casting vote : And, further, to find that the expenses incurred in presenting the application, and consequent thereto, should form a good and lawful charge against the funds of the burgh. On 3d November the court, in respect the provost and magistrates of the said burgh all go out of office on Tuesday 6th November current, with the exception of Bailie Thomas Morrison, and that he is incapacitated by the state of his health from acting as returning officer or otherwise under the provisions of the statute 15 and 16 Vict., cap. 32, sections 5 and 6, granted the prayer of the petition, and found the petitioners entitled to their expenses, as taxed by the auditor of court, out of the burgh funds, and found and authorised a certified copy of the interlocutor to be used in place of an extract, and the petitioners to act thereon.

² In *The King v. The Mayor of London*, 1st January 1829, 9 Barnewall and Cresswell (K. B.), 1, it was contended that the election of an alderman was bad on account of the presiding officer having been changed during the election, but the court overruled the objection.

See note 4, Additions and Corrections, No. (49).

(38.) Page 56, between footnotes 1 and 2, insert the following note :—

1^a. The omission of the returning officer, presiding officer, clerks, and policemen engaged in the election, to make the declaration of secrecy will not, however, invalidate the election. Drogheda Borough Election Case, tried before Mr. Justice Barry on 29th May 1874. O'M. and H. Reports, Vol. II., pp. 206, 207.

(39.) Page 57, line 27, after "station" insert ².

(40.) Page 57, at the bottom of the page, insert the following note :—

² This provision should be relaxed as regards municipal elections at all events. The experience of the elections which have taken place in Glasgow under the Ballot Act shows that in many wards one compartment for every three hundred electors entitled to vote at each polling station would be sufficient.

(41.) Page 62, line 7, after "ballot box" insert :—

Ballot papers are not subject to stamp duty.³

(42.) Page 62, at the bottom of the page, insert the following note :—

³ *The Queen v. Strachan*, 29th April 1872. L. R. 7 (Q. B.), p. 463.

(43.) Page 70, line 5, after “vote” insert :—

See note 2, Additions and Corrections, No. (40).

(44.) Page 70, line 12, after “Justice of the Peace” insert ².

(45.) Page 70, line 28, delete “do not require to be stamped,” and substitute “are not subject to stamp duty.”

(46.) Page 70, between footnotes 2 and 3, insert :—

See note 1^a, Additions and Corrections, No. (38).

(47.) Page 71, line 21, after “act” insert :—

The question had previously been raised in the case of *Stewart v. The Magistrates of Greenock*, 12th July 1853 [15 D., 863 ; 25 Jurist, 530 ; 2 Stuart, 530], but does not seem to have been decided. It appears to the writer, that when a joint appointment cannot be made, or, being made, cannot be confirmed, the actings of the presiding officer and clerks appointed by the outgoing provost would be sustained, on the principle that acts done in good faith by a person *de facto* exercising public functions on a colourable title are valid.⁴

(48.) Page 71, line 33, after “appointment” insert :—

A similar provision exists in Glasgow. See section 18 of the Provisional Order scheduled to and confirmed by the General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Glasgow) Act, 1877.

(49.) Page 71, at the bottom of the page, insert the following note :—

⁴ See the case of *Livingstone v. The Presbytery of Hamilton*, 26th June 1846, 8 D., 898 ; affirmed, 6 Bell, 469 ; and other cases referred to in the footnote to No. 189 of these Observations. Heywood, in his work on Borough Elections (1797), states that elections made under an usurping presiding officer, where there has been the form of an election, have been uniformly supported [p. 61]. Mr Rogers, in his work on Elections and Registration (12th ed.), says :—“A question occasionally occurs whether an election is imperilled by want of title in the person acting as returning officer. It is believed, however, that an election fairly held will not be vitiated on such a ground” [p. 296, note 2].

(50.) Page 74, line 7, after “stations,” insert °.

Immediately above footnote 1 insert the following note :—

° See note 1^a, Additions and Corrections, No. (38).

(51.) Page 79.—Add to footnote 2 the following :—

In the Oldham Borough election case, tried before Mr Justice

Blackburn on 16th March 1869, a vote was objected to as having been given at the wrong polling station. Mr Justice Blackburn said:—"The poll-clerk should have refused the vote, and the voter should have gone to the proper booth. It is not at all an intentional mistake ; it was the fault of the voter as well as the poll-clerk. I shall at present strike off the vote for Cobbel and Spinks ; but should this one vote turn the scale, I will reserve the point for the Court of Common Pleas." [O'M. and H.'s Reports, Vol. I., pp. 163, 164.]

(52.) Page 85, line 14, after "exclusion," insert:—

With regard to a lunatic, who, though for the most part he may have lost the sound exercise of his reason, yet sometimes has lucid intervals, it seems that the returning officer has only to decide whether, *at the moment of voting*, the person offering himself is sufficiently *compos mentis* to discriminate between the candidates, and to make the declaration prescribed by schedule A of the Municipal Election Amendment (Scotland) Act, 1868 (if required), in an intelligible manner.³

Mere childishness or imbecility on the part of an elector who is able to comply with the conditions above pointed out will not justify a returning officer in declining to accept his vote.⁴

What is the degree of drunkenness that disqualifies a voter from voting it is difficult to determine.⁵ The returning officer must decide each case for himself on the principle explained with reference to lunatics.

(53.) Page 85, at the bottom of the page, insert the following notes:—

³ Heywood on County Elections (2d ed., 1812), p. 260. Bishops Castle, A.D., 1820. 13 Journals of the House of Commons, 171 ; Oxfordshire, 27 Journals, 176. Rogers on Elections and Registration (12th ed.), p. 195.

⁴ Bridgewater, 21st February 1803, Peckwell's Election Cases, Vol. I., p. 108 ; Oakhampton, 4th February 1791, Fraser's Election Cases, Vol. I., p. 164.

⁵ Wigan, 16th April 1839, Falconer and Fitzherbert's Election Cases, p. 695 ; Monmouth, 2d June 1835, Knapp and Ombler's Election Cases, p. 413.

(54.) Page 86, line 4, after "register," insert:—

There seems to be no objection to a candidate voting either for himself or for another."

(55.) Page 86, line 7, after "act," insert ².

(56.) Page 86, line 10, after "Saturday," insert ³.

(57.) Page 86, immediately before footnote 1, insert the following note:—

* This was held in a parliamentary election in England. Harwich, 31st March 1803, Peckwell's Election Cases, Vol. I., p. 383; Rogers on Elections and Registration (12th ed.), p. 200.

(58.) Page 86, add to footnote 1 the following :—

Oldham Borough Election, 16th March 1869. *Dictum* of Mr. Justice Blackburn. [O'M. and H.'s Reports, Vol. I., p. 159.]

(59.) Page 86, at the bottom of the page, insert the following footnotes:—

² Of the physical incapacity the presiding officer must satisfy himself in each case. Usually the appearance and statement of the voter will be sufficient.

³ The mere *declaration* of a voter that he is a Jew, and that he objects on religious grounds to vote in the manner prescribed by the Act, is all that is necessary to entitle him to have his vote marked for him, if the poll be taken on a Saturday.

(60.) Page 89, line 7, after "election" insert †.

(61.) Page 89, line 20, after "statute" insert §.

(62.) Page 89, line 25, after "received" insert ‡, and add the following :—

If there be any discrepancy between the declaration and statement of the voter, on the one hand, and the entry in the register, perhaps the safest course is to record the vote as a tendered vote; although in some such cases it has been held that the voter ought to have been put on the poll.⁵

(63.) Page 89, line 36, delete "§," and insert "‡."

(64.) Page 89, between footnotes 1 and 2 insert the following note :—

† Under no circumstances can one person vote twice in the same election, and if he does record two votes, one will be struck off. Thus in the Oldham election case, 16th March 1869, John Jinks, 14 Charlotte Street, appeared twice on the register; once spelt with a J., and once with a G. Only one John Jinks existed, and he spelt his name with a J. A vote, however, had been given in the name of John Jinks and also in the name of John Genks. Mr Justice Blackburn held that the vote given in the name of John Genks must be struck off. [O'M. and H.'s Reports, Vol. I., p. 156.]

‡ Canterbury, 14th May 1835, Knapp and Ombler's Election Cases, p. 326. No other questions or dealings with the voter by the returning officer, or presiding officer or clerks, are allowable under any pretext. [*Ibid.*, p. 131.] Bedford, 5th March 1833. [Perry and Knapp's Election Cases, 139. Cockburn and Rowe's Election Cases, 87.]

⁴ But if he again tender himself, and offer to make the declaration, he should be allowed to do so, and to vote. [Taunton, 27th February 1838, Falconer and Fitzherbert's Election Cases, 305.] In *Cullen v. Morris*, 1819 [2 Starkie's Reports, 577], it was held that a *scot* and *lot* voter, not having paid his rates, no demand having been made upon him before the poll, may, having been rejected for that reason, on payment of his rates, again tender himself and vote. "It is hard to suppose," says Mr. Rogers, "that the refusal—possibly a *bona fide* one, with the intention of making further inquiry before voting—to answer the questions, etc., at one period of the day, should act as a disqualification at another." [Rogers on Elections and Registration (12 ed.), p. 315.]

⁵ Monmouth, 2d June 1835. [Knapp and Ombler's Election Cases, p. 414.] Taunton, *et supra*. New Sarum, 30th April 1833. *Moody's Case*. [Perry and Knapp's Election Cases, p. 255.]

(65.) Page 90, line 9, delete "¹," and insert the following as the first paragraph of the footnote:—

¹ Sligo, 29th July 1857 [Wolferstan and Drew's Election Cases, p. 227]. *The Queen v. Thwaites*, 16th April 1853 [1 Ellis and Blackburn (Q. B.), 704; 22 L. J. (Q. B.), 238]; *Loudon's Case*. Taunton, *ut supra*.

(66.) Page 92, line 3, after "up" insert °.

Immediately before footnote 1 insert the following note:—

° It has been questioned whether, if a voter, through inadvertence, marks his ballot paper wrongly, *i.e.*, for A instead of B, and then applies to the presiding officer for another ballot paper in lieu of that which he has erroneously marked and offers to deliver up, the presiding officer is bound to give it. It appears to the writer that he is. Previous to the passing of the Ballot Act a voter might correct a mistake *before* the poll clerk had entered his vote. *Stirlingshire*, 26th April 1838 [Falconer and Fitzherbert's Election Cases, 542; Heywood on County Elections, 428], but not afterwards. Taunton, *ut supra*; Monmouth, *ut supra*; *Lewellyn's Case*;) although a committee decided otherwise; Reading, 6th March 1838 [Falconer and Fitzherbert's Election Cases, 556; *Clift's and Corderoy's Cases*]. In the Oldham case, 16th March 1869, it appeared that Chatham, in answer to the question for whom he voted, said, "Platt and Hibbert," but immediately corrected himself and said, "Hold! for Cobbet and Hibbert." The poll clerk, however, had entered the vote for Platt and Hibbert, and said it was too late. Mr. Justice Blackburn "thought that the voting was not completed when the mistake was corrected, and consequently ordered a vote to be added to Cobbet, and one to be struck off from Platt. [O'M. and H.'s Reports, Vol. I.,

p. 163.] Under the system of vote by ballot, the act of voting cannot be said to be completed till the ballot paper is deposited in the ballot box ; and till so completed every reasonable facility should be afforded to the voter to correct any mistake inadvertently made by him. Besides, the inadvertent erroneous marking of a ballot paper is an accident which prevents it from being "conveniently used as a ballot paper." The writer sees no reason to doubt, therefore, that the presiding officer should treat such a case in all respects as if the ballot paper had been inadvertently torn or otherwise spoilt, and he does not consider it to be either necessary or expedient that the vote should be marked as a tendered ballot paper.

(67.) Page 95, line 28, after "election" insert "and the same doctrine has been held by the Court of Session." ²

(68.) Page 95, at the bottom of the page, insert the following note :—

² In *Haldane v. Holburn*, 12th March 1761, Mor., 1882, the Court held that where force is used in a municipal election, as there are no means of ascertaining what influence it has upon the election, judges must either give it no effect at all, which never can be right, or give it a total effect to reduce the election *funditus*.

(69.) Page 96, line 30, after "proper" insert ⁴.

(70.) Page 96, at the bottom of the page, insert the following note—

⁴ See note 3, Additions and Corrections, No. (64).

(71.) Page 114, line 17, after "356" insert *Cockburn and Rowe's Election Cases*, p. 548.

(72.) Page 122, between footnotes 1 and 2 insert the following :—

See footnote 1^a, Additions and Corrections, No. (38).

(73.) Page 124, line 25, after "secrecy" insert ⁴.

(74.) Page 124, at the bottom of the page insert the following note :—

See footnote 1^a, Additions and Corrections, No. (38).

(75.) Page 173, line 15, after "judgment" insert ^o.

(76.) Page 173, immediately above footnote 1 insert the following :—

^o In illustration of this—Though the responsibility for the acts of another depends on the principle embodied in the maxims, *qui facit per alium facit per se*, and *respondeat superior*, yet if the principal is obliged to do a thing compulsorily, the courts of law hold that these maxims do not apply. Thus a procurator-

fiscal is not liable for the cruel and oppressive manner in which a criminal warrant has been executed by sheriff-officers whom he had employed to do the work, the wrong being the individual act of the proper officer [*Munro v. Taylor*, 25th February 1845. 7 D., 500]. Similarly, a shipowner is, in general, not liable for the negligence or unskilfulness of a pilot whom he is compelled to employ [*Smith's Mercantile Law* (8th Ed.), p. 309]. There is no authority and no principle that the writer knows of for holding that a public officer, whose own conduct has been correct, incurs responsibility, by the mere act of employing presumably competent and unobjectionable persons to perform duties which he cannot possibly discharge himself.

See opinions by Lord Jeffrey in the cases of *Melvin v. Wilson*, 22d May 1847 [9 D., 1136-7]; and by Lord Neaves in *Bain v. Burnet*, 11th February 1857 [19 D., 407].

(77.) Page 175, line 19, delete "149," and substitute "150-2."

(78.) Page 176, line 22, delete "149, 150," and substitute "150-2 and 150-3."

(79.) Page 177, between footnotes 1 and 2 insert the following:—

In the *Queen v. Beardsall*, 20th May 1876 [Q. B. D., 1, 452], a prosecution having been instituted against a deputy returning officer, who had presided at a booth in a municipal election in the borough of Stockport, for offences under the Ballot Act, a county court judge, in the exercise of jurisdiction given by rule 64 of the act, made an order directing the town clerk to produce and show, for the purpose of the prosecution, certain rejected ballot papers, counterfoils, counted ballot papers, and spoilt ballot papers relating to the same polling station, and to open the sealed packets containing those documents, and the marked copy of the register, and to take all such proper means as he should deem necessary, in order that the mode in which any particular elector had voted should not be discovered; and farther ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Mr. Justice Blackburn allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected, so as to show how the votes appeared to have been given. The prisoner was found guilty on thirty-two of thirty-five counts, but the sentence was respited, and the prisoner was admitted to bail till a decision had been obtained by the Court of Queen's Bench on a case stated by the judge, in

which the following questions were to the court:—(1.) Was it wrong under the circumstances to allow the counterfoils and marked register to be given in evidence? (2.) Was it wrong, under the circumstances, to allow the face of the voting papers to be inspected, so as to show the votes purported to be given? And (3.) Ought the conviction to be quashed on both or either grounds? The court held that the judge had acted rightly, and the conviction was affirmed.

(80.) Page 193, line 10, after “law,” insert ³.

(81.) Page 193, at the bottom of the page, insert the following note:—

As to the effect of bribery in municipal elections, see Culross, 11th January 1754, Elchies *voce* Burgh Royal, No. 39, Notes, p. 84; M'Kenzie *v.* Scott (Dingwall), 7th August 1759, Mor., 1877; Haldane *v.* Holburn (Inverkeithing), 12th March 1761, Mor. 1882. In the last-mentioned case the court held unanimously (1) that bribery in such elections can have no farther effect than to disqualify the bribers and those who are bribed; and (2) that when force is used, as there are no means of ascertaining what influence it has upon the election, judges must either give it no effect at all, which never can be right, or give it a total effect to reduce the election *funditus*.

(82.) Page 201, line 26, delete “consitute,” and insert “constitute.”

(83.) Page 202, line 7, delete “16 Geo. IV.,” and substitute “16 Geo. II.”

(84.) Page 202, line 7, after “cap. 11,” insert ³.

(85.) Page 202, at the bottom of the page, insert the following note:—

See No. 151 of these Observations.

³The former of these acts (7 Geo. II., cap. 16), which had reference to royal burghs alone [Stewart *v.* The Magistrates of Greenock, 12th July 1853, 15 D., 863; 25 Jurist, 530; 2 Stuart, 530], was repealed by the Statute Law Revision Act of 1867 (30 and 31 Vict., cap. 59), except sections 4, 6, 7, and 8; and the latter act (16 Geo. II., cap. 11), which related to parliamentary elections, was wholly repealed by the Statute Law Revision Act of 1867.

(86.) Page 203, between lines 34 and 35, insert the following note:—

In England, admission to office and swearing in (when that is required), together form the consummation of the election of persons to the office (2 East (K. B.), 84; The King *v.* Bosworth, Trinity Term, 12 Geo. II., 2 Strange, K.B., 1112; The Queen *v.* Humphrey, Trinity Term, 1839, 10 Adolphus and Ellis, Q.B., 370).

(87.) Page 211, line 30, after "345" add—

High v. Main, 6th August, 1789, Mor., 1893. But see footnote to No. 1 of these Observations, pp. 3, 4. See also note 2^c, Additions and Corrections, No. (15).

(88.) Page 217, line 38, after "231" add the following note:—

This state of matters has been rectified by the "General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1877" (40 & 41 Vict., cap. 22), which empowers the Court of Session in either of its Divisions to make orders for facilitating the adoption or execution of the act of 1862.

(89.) Page 218, line 26, delete "under," and insert in places subject to.⁴

⁴ Can a place be regarded as "*subject to*" the act of 1850 or 1862, in the fair sense of the Ballot Act, before commissioners have been appointed to carry its provisions into execution? The question is important, because upon it depends the farther question, whether the first election of Commissioners of Police, in places which adopt the act of 1862, is to be conducted under the provisions of the Ballot Act, or of section 46 of the act of 1862? The question was raised in Grangemouth in November 1872, and Mr. A. R. Clark, who was then Solicitor-General, was consulted as to the manner in which such first election of commissioners should be conducted. His opinion was as follows:—
"There is difficulty in the matter, but I have come to be of opinion that the election should be conducted in the manner provided by the act of 1862, without reference to the Ballot Act.

"It is plain that the proceedings up to the taking of the poll cannot proceed in the manner directed by the Ballot Act. There is no clerk to receive the nominations, and no magistrate to act as returning officer. I think, therefore, the proceedings must so far be conducted in the manner prescribed by the act of 1862.

"The question is whether, at this point, the provisions of the Ballot Act should be brought into operation, or whether the procedure which has begun under the act of 1862, should be carried out under that act? I am disposed to take the latter view—(1), because there is no direction to proceed partly under one act, and partly under another; (2), because the sheriff is not returning officer under the Ballot Act, and has therefore no authority to proceed under it; and (3), because a place, in the fair sense of the Ballot Act, is not subject to the act of 1862 until commissioners have been appointed to carry it into execution."

He was also consulted as to whether the meeting for the first election of commissioners must be held within twenty-one days, and not more than thirty days, after the date of the deliverance of the sheriff, declaring that the act of 1862 shall apply in whole

or in part to the burgh adopting the same, or may be held at any convenient early day after intimation made in terms of section 26 of the act of 1862? He replied :—"I answer this question according to the latter alternative. The ruling words of the section [46] are, 'as soon as may be,' and the words at the close of it must, I think, be construed in consistency with them. Hence I read the direction that the meetings shall be summoned in the same manner and at the same distance of time as is provided in regard to the first meeting, as meaning no more than that the meeting shall be called in the same manner, and upon the same notice as is provided in regard to the first meeting."

(90.) Page 220, between lines 34 and 35 insert the following :—

In the session of 1878 the Commissioners of Police of Govan, which had adopted the General Police Act, 1862, promoted a bill by which it was proposed to apply to the police burgh the provisions of the Burgh Boundaries Acts, 20 and 21 Vict., cap. 70, and 24 and 25 Vict., cap. 36, and to obtain powers—(1) to increase the number of police commissioners; (2) to increase the number of magistrates by the election of "one senior magistrate or *provost*, and four junior magistrates," instead of "one senior magistrate and two junior magistrates," as authorised by the Police Act of 1862; (3) to elect a dean of guild and sub-dean of guild, who should have all and the like jurisdiction within the police burgh as the dean of guild of any royal burgh has within such royal burgh; and (4) to appoint officers of the Dean of Guild Court, and to frame rules of procedure and tables of fees to be exacted in the said court. The Lord Advocate, however, on behalf of the Government, intimated his intention to oppose the conferring of such powers on a police burgh, and the clauses by which this was proposed to be done were withdrawn.

(91.) Page 227, line 52, after "1862" insert :—

Repealed by section 2 of "The General Police and Improvement (Scotland) Amendment Act, 1878," and clause 3 of the latter act substituted. For the effect of the change thus made, see note. Additions and Corrections, Nos. (17) and (20).

(92.) Page 240, between lines 46 and 47 insert the following note :—

See also *dicta* of Lord Truro in delivering the judgment of the House of Lords in *Gosling v. Veley*, on 12th August 1853. Clark's House of Lords Cases, Vol. IV., pp. 797-813.

(93.) Page 241, line 9, delete "a provost is" and insert "the provost and magistrates are."

(94.) Page 241, line 14, delete "has" and insert "and magistrates have."

(95.) Page 241, between lines 32 and 33 insert the following notes :—

See No. 150 of these Observations.

In November 1877, the Lord Advocate (Watson), when consulted by the magistrates and town clerk of Dunfermline, gave the following opinion :—I do not think that, under the provisions of section 6 (of the Act 15 & 16 Vict., cap. 32) a retiring provost, or failing him a retiring magistrate, has right to preside at the first meeting after the annual election, except in the case where the provost and all the magistrates have from one cause or another ceased to hold magisterial power before the election. In the case where there has been a complete cessation of magisterial powers, the duty of attending and presiding at the first meeting of the new council is, by the statute, made imperative upon “the retiring provost or chief magistrate, or failing him the retiring magistrate next in seniority.” It appears to me that the duty is plainly imposed upon the retiring provost in the first instance; and that he cannot devolve that duty upon the magistrate next to him in rank, unless with consent of the latter, or on some other ground which would be considered a sufficient justification of his absence by a court of law.

(96.) Page 243, line 17, after “*affiori*” insert ³.

(97.) Page 243, at the bottom of the page insert the following note :—

³ See Nos. 145 and 238 of these Observations.

(98.) Page 250, at the bottom of the page insert the following note :—

See *dicta* of Lord Truro in delivering the judgment of the House of Lords in *Gosling v. Velej*, on 12th August 1853. *Clark's House of Lords Cases*, Vol. IV., pp. 797-813.

(99.) Page 256, between footnotes 1 and 2, insert the following note :—

See No. 140 of these Observations.

(100.) Page 256, add to footnote ² the following :—

See note, Additions and Corrections, No. (85).

(101.) Page 261, line 11, after “declarator” insert ¹.

(102.) Page 264, line 11, after “custom” insert ^o.

(103.) Page 264, between lines 39 and 40 insert the following note :—

^o In the case of *Kidd and Others v. The Magistrates of Wester Anstruther*, 17th December 1852, 15 D., 257; 25 Jurist, 170; 2 Stuart, 131, it was held that a usage of more than a century must be held to fix the set of a burgh which had no written set. This burgh was one of the nine burghs exempted from the provisions of the Act 3 and 4 Will. IV., cap. 76.

(104.) Page 266, line 1, delete “acted upon, and has been recognised,” and substitute “by section 33 as interpreted.”

(105.) Page 266, line 3, delete “as also,” and substitute “made.”

(106.) Page 266, line 5, delete “that section,” and substitute “these sections.”

(107.) Page 274, add to footnote 3 the following :—

Section 51 of the Act of 1862 is repealed by section 2 of the General Police and Improvement (Scotland) Amendment Act, 1878, and section 4 of the Act of 1878 is substituted.

(108.) Page 279, between lines 39 and 40 insert the following paragraph :—

The question was considered by Lord Kinloch (Ordinary) in the case of *M'Arthur v. Linton*, decided 9th, and reported 13th February 1864 [2 M.P., 659; 36 Sco., Jur., 310]. In that case it was contended that the bailies must be elected annually. The Lord Ordinary, however, was satisfied, on a comparison of section 17 and section 24 of the Burgh Reform Act, 3 and 4 Will. IV., cap. 76, that that proposition could not be sustained; and said: “A councillor elected bailie continues such till the time he goes out of office as councillor. The 17th section contains no enactment as to the duration of the office. The 24th necessarily implies that it terminates only when the bailie is in the third of the council going out of office. The provision as to the lord provost and treasurer remaining in office for three years is not intended as a contrast to a provision for annual election of bailies, but simply to secure the continuance in office of these functionaries, where the office might otherwise come to a close under the general statutory provisions.

(109.) Page 282, line 16, after “police” insert “elected under its provisions.”

(110.) Page 282, lines 37 and 38, add the following note :—

Section 51 of the General Police Act of 1862 is repealed by section 2 of “The General Police and Improvement (Scotland) Amendment Act, 1878,” and section 4 of the latter act is substituted.

(111.) Page 283, line 18, after “section,” insert ².

(112.) Page 283, line 41, delete “law and.”

(113.) Page 283, line 42, after “it,” add the following :—

See footnote 4, Additions and Corrections, No. (116).

² The 51st section of the act of 1862 is repealed by section 2 of the General Police and Improvement (Scotland) Amendment Act, 1878, and section 4 of the Act of 1878 is substituted, but its phraseology on this subject is identical with that of section 51.

(114.) Page 285, line 18, delete "1860," and insert 1862.

(115.) Page 289, line 19, after "office-bearers" insert ⁴.

(116.) Page 289, at the bottom of the page, insert the following notes :—

In October 1841, Mr. Wood (afterwards Lord Wood) and Mr. Anderson (afterwards Lord Anderson) were consulted by the Town Council of Edinburgh as to whether it was absolutely necessary that they should elect an *interim* councillor in room of A., who had resigned on 28th September, and whose resignation was to take effect on 19th October? The interim election, it was pointed out, could not be made till 26th October, and the person elected would have to go out of office at the annual election on 2d November. Counsel advised as follows:—"As it is enacted by the 25th section of the statute, 'That if any vacancy shall, in the course of the year, occur in the council,' by death, disability, or resignation, 'the same *shall* be filled up *ad interim* by the remaining members of the council,' we are of opinion that it is the duty of the council to proceed immediately to fill up the vacancy occasioned by A.'s resignation, notwithstanding that the interim councillor so to be elected will not continue in office beyond a few days. The enactment of the statute on this point is imperative."

⁴ The proviso in the end of section 25 of the Act 3 and 4 Will. IV., cap. 76, and of section 23 of the Act 3 and 4 Will. IV., cap. 77, is not very happily expressed. These sections enact that *interim* councillors, magistrates, or office-bearers shall go out of office on the first Tuesday in November, and that the vacancy thereby occurring shall be supplied at the next annual election of councillors and magistrates, or office-bearers; "provided that if *the* vacancy shall have occurred" in any burgh divided into wards, "*such* vacancy shall, at such annual election, be supplied by the ward of such burgh by which the councillor who had died, or resigned, or had been disabled, had been elected." The provision should have been to the effect that such vacancy, *if in the office of councillor*, shall, at such annual election, be supplied by the ward of such burgh by which the councillor who had died, or resigned, or had been disabled, had been elected, and, *if in the office of magistrate or office-bearer*, shall be supplied *by the council at the annual election of magistrates and office-bearers*. The proviso, as it should thus have been expressed, is what the legislature evidently intended to enact, and the practice accords with it. The phraseology of the corresponding provisions in section 36 of the General Police Act of 1850, and in section 55 of the General Police Act of 1862, is still more unfortunate. See footnote, p. 283.

(117.) Page 290, line 7, after "resigned" insert ¹.

(118.) Page 290, line 8, after "third" insert:—

There seems to be nothing to prevent a councillor, magistrate, or office-bearer, who has resigned, from being immediately re-elected. The proviso at the end of the 16th section of the Act 3 and 4 Will. IV., cap. 76, and of the 12th section of the Act 3 and 4 Will. IV., cap. 77, to the effect that any councillor included in the retiring third "shall be capable of being immediately re-elected," is merely declaratory of the rule of common law, and cannot be construed by implication into a prohibition against the re-election of a councillor who has resigned.²

(119) Page 290, at the bottom of the page, insert the following note:—

¹ The 25th section of the Act 3 and 4 Will. IV., cap. 76, and the 23d section of the Act 3 and 4 Will. IV., cap. 77, enact that "if any vacancy shall in the course of the year occur in the council, or magistracy, or office-bearers," of any burgh, "by death, disability, or resignation, the same shall be filled up *ad interim* by the remaining members of council, . . . but any councillor, magistrate, or office-bearers so elected *ad interim* shall go out of office on the first Tuesday of November next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of councillors, and magistrates, or office-bearers in such burgh; provided that if *the* vacancy shall have occurred" in any burgh divided into wards, "such vacancy shall at such annual election be supplied by the ward of such burgh by which the councillor who had died, or resigned, or been disabled, had been elected, and which shall in this case elect an additional councillor, unless the party so *dying* or *disabled*" (the word "resigning" does not occur here) "would then have gone out of office as one of the third being directed to retire." The vacancies which wards are by these sections authorised to supply at the annual elections are exclusively those occasioned by the retirement of *interim* councillors, magistrates, or office-bearers; but it is to be observed, (1.) That all vacancies in the magistracy or office-bearers must be supplied by the council; and (2.) That in practice vacancies occasioned by the death or resignation of members of council during the year, but which have not been filled up *ad interim*, are supplied at the annual elections of councillors, as well as vacancies by resignations made so as to take effect at the period of the annual election, in terms of section 26 of 3 and 4 Will. IV., cap. 76, and section 24 of 3 and 4 Will. IV., cap. 77. The absence of the word "resigning" in the last clause of the 25th and 23d sections above quoted, gave rise to questions which occurred in Edinburgh in 1841. In that case two of the three representatives of one of the wards fell to retire at the annual election in November, as of the third of the council who then had to go out of office. One councillor who, had he remained in office till the first Tuesday in November, would then have fallen to retire, resigned a few days previously. The

town-clerks had thus to determine whether the vacancy occasioned by the resignation in such circumstances could be regarded as one of the two, or whether the two councillors who had not resigned fell to retire as of the third, thus necessitating the supply of three vacancies instead of two at the annual election. Mr Wood (afterwards Lord Wood) and Mr Anderson (afterwards Lord Anderson) were consulted on the difficulty, and returned the following opinion:—"The question whether notices should be given by the town-clerks for the election of two or of three new councillors in the third ward is attended with great difficulty, and after giving it our best consideration, we have not been able to form an opinion either very decided in itself, or very satisfactory to our own minds. The great difficulty lies in this, that in determining the effect of the omission of the word "resigned" in the last clause of the 25th section, the strict rules of statutory construction lead to a result at variance with what we conceive to be the spirit and meaning of the enactment.

"The 25th section, while it provides generally that an additional councillor shall be elected to fill up the vacancy of any *interim* councillor appointed in consequence of 'death, disability, or *resignation*,' only excepts from this rule the case when the party 'dying or disabled' would otherwise have retired at the annual election. Now the word 'disability' has a technical meaning separate and distinct from that of resignation. It means disability in respect of the loss of the elective qualification, or of any other legal disqualification as a voter; and it is twice used in this limited sense in this same section. According to the statutory rules of construction, therefore, it ought to receive the same signification in the excepting part of the clause; and hence we think that if the strict letter of the statute is to be followed, additional councillors ought to be appointed in all cases except when the vacancy has occurred in consequence of death or proper legal disability.

"On the other hand, however, this reading of the clause appears to us to be plainly at variance with the spirit of the statute. It was one of its declared objects that only one-third of the councillors, or as nearly that number as may be, shall annually retire. And although a certain departure from this rule was indispensable in the case of vacancies by death, disability, or resignation, the legislature, by the excepting clause at the close of the 25th section, plainly intended to introduce an important and legitimate limitation on this departure from its otherwise declared objects. An *interim* councillor is only appointed for supplying the vacancy till the next annual election. He is merely a *locum tenens*; and if the party whose place he supplies would have retired at the next annual election, it was plainly in consistency with the declared objects of the statute to regard him as one of the retiring councillors. The excepting clause appears to us to

have been framed with this view; and we can see no reason for any distinction in principle between a vacancy occasioned by resignation and one by death or disability. Hence there is room for maintaining that the words in the excepting clause ought to receive the utmost latitude of interpretation, so as to give effect to the views of the legislature; and that as the word 'disabled' may be interpreted as comprehending resignation, it ought to receive that interpretation.

"We are not prepared, indeed, to say that the court, looking to the spirit of the enactment, and especially to the gross abuse to which the strict rule of construction might lead (of which the elusory nature of [A.'s] resignation forms a most apt illustration) might not hold that no additional councillor ought to be elected in place of [A.]. At the same time we are of opinion that it is a clearer and safer course for the clerks to take for their guidance the strict letter of the statute, and to intimate in their notices that there are three vacancies to be filled up in the third ward."

The precise circumstances under which the case above referred to occurred could not have happened since the decision in the case of *Thomson v. The Magistrates of Rutherglen*, referred to in No. 119 of these Observations. Resignations of councillors during the year are of frequent occurrence, however, and the writer believes that, in practice, the vacancies thence arising are dealt with in all respects as if they arose from death or disability. On the strength of that practice, based on the obvious intention of the statute, the writer has ventured to conjoin in the text the word "resigned" with the words "died or become disabled."

² An opinion to the above effect was given by Mr. Wood (afterwards Lord Wood), and by Mr. Adam Anderson (afterwards Lord Anderson), to the Town Council of Edinburgh in October 1841.

(120.) Page 291, between footnotes 1 and 2, insert—

See the observations of the Lord President (Inglis) in *Sime v. Coghill*, 15th November 1877, 5 *Rettie*, p. 132.

(121.) Page 293, at the bottom of the page insert the following:—

See Note, Additions and Corrections, No. (120).

(122.) Page 294, at the bottom of the page insert the following footnote:—

See the opinion of Mr. Wood (afterwards Lord Wood), and Mr. Adam Anderson (afterwards Lord Anderson), as to the interpretation to be given to the word "disability," in this section — quoted in footnote 3. Additions and Corrections, No. (116).

(123.) Page 296, line 3, after "cap. 12)¹" insert—

Wherever a councillor, magistrate, or office-bearer becomes "disabled," a vacancy is occasioned by the disability, and resignation would not seem to be competent. One cannot "resign" what he has previously lost. So, if a person who has been acting as

a councillor, magistrate, or office-bearer, is discovered never to have possessed the qualification which the statute prescribes, the proper course is not to proceed on a resignation of the office, even should a resignation be tendered, but to declare a vacancy in respect of the disability, and proceed to fill up the vacancy. This may be done at once, and without waiting for the expiry of three weeks, as would be necessary before resignation could take effect. There may, however, be cases in which the "disability" is so doubtful that it would be prudent both to act upon a resignation and at the same time to declare a vacancy, thus meeting the difficulty by two methods, one or other of which could not be impugned. In such a case the disability should not be declared until the resignation had taken effect.

(124.) Page 312, line 41, after "authorised" insert the following:—

"The heritors and resident burgesses to elect a magistracy and council, as in the case of Pittenweem in 1767 [Mor., 2528]; sometimes it authorised."

(125.) Page 319, between lines 36 and 37 insert the following note:—

See No. 218, sub-section (4), of these Observations.

(126.) Page 345, last line, after "76" add the following:—

See the Town of Banff v. Campbell, 29th February 1744 [Elchies *voce* Burgh Royal, No. 20], where it was found that a royal burgh and its magistrates are not liable for the malversations or neglects of former magistrates. Elchies, Notes, p. 75.

(127.) Page 350, line 47, delete "244," and insert "250."

(128.) Page 351, add to footnote 2 the following note:—

But see section 26 of the Title to Lands Act, 1860, re-enacted by section 154 of the Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict., cap. 101). The latter section enacts that the town-clerk of any burgh may expedite and record, and that the keeper of any burgh or other register of sasines, reversions, etc., may record any conveyance or deed in which such town-clerk or keeper may be personally interested, either individually or as a trustee for another, or otherwise; and that no conveyance or deed, expedite or recorded prior to the date of the passing of the act, or which may hereafter be expedite or recorded, shall be challengeable or in any way affected by reason of personal interest in the town-clerk or keeper of the register, by whom the same has been expedite or recorded as aforesaid.

(129.) Page 352, line 47, after "infestments," add the following:—

But see section 154 of the Titles to Land Consolidation

(Scotland) Act, 1868, referred to in note, Additions and Corrections, No. (128).

(130.) Page 356, line 32. On 7th January 1879 the Second Division of the Court recalled Lord Rutherford Clark's interlocutor of 12th July 1878, and found that the pursuer had "*no jus quæsitum* in the two rooms in question as town-clerk's officer in the town hall building of the burgh of Annan," but that the defenders were "bound to afford him sufficient accommodation in the said building as town-clerk of the said burgh, without being liable in payment of rent to the defenders therefor."

(131.) Page 357, line 29, delete "M. or," and insert "Macph., p."

(132.) Page 405, line 3, after "section 31," insert °.

(133.) Page 405, between lines 26 and 27, insert the following note :—

° In February 1879, Mr. J. B. Balfour, advocate, was consulted by the town council of Leith, and gave it as his opinion that Sir William Rae's Act "applies to royal burghs only."

(134.) Page 455, line 10, for "1848" substitute "1858."

APPENDIX.

(135.) Page [10], line 29, after “section 1” insert the following:—

The Burghs (Division into Wards) Amendment Act, 1876 (39 and 40 Vict., cap. 25), appoints section 17 of the Municipal Elections Amendment Act, 1868, to be read and construed as if 5000 were substituted for 10,000.

(136.) Page [45], line 19 from bottom, after “1847” insert ¹.

(137.) Page [45], line 14 from bottom, after “Police” insert ².

(138.) Page [45], at the bottom of the page, insert the following notes:—

¹ This act is repealed, except as regards such burghs as had adopted the powers and provisions of the Act 3 and 4 Will. IV., cap. 46, previous to 15th July 1850, by section 1 of the General Police Act of 1850 (13 and 14 Vict., cap. 33). Section 375 of the latter act empowers the magistrates and councils of parliamentary burghs which had no means of meeting the necessary expenses of the burgh to impose, levy, and recover an amount not exceeding 3d. in the £ on the yearly rent of premises within the burgh of the annual value of £3 or upwards, in the like manner and from the same descriptions of persons and property, and under the like provisions and exceptions as the assessments leviable under the General Police Act of 1850 for other purposes are by that act authorised to be imposed, levied, and recovered. The act of 1850 has in turn been repealed by section 1 of The General Police and Improvement (Scotland) Act, 1862, except only as regards burghs in which the provisions of the act of 1850, or any part thereof, had, on or before 1st August 1862, been adopted. The 439th section of the act of 1862, however, empowers the magistrates and council of parliamentary burghs in which there are no means of defraying the necessary expenses of the burgh, to levy an assessment not exceeding 3d. in the £ of the yearly rent of premises within the burgh, which amount it appointed to be imposed, levied, and recovered in the same way as the police assessment under the act of 1862 is thereby appointed to be imposed, levied, and recovered.

² Repealed, except as regards such burghs as had adopted its powers and provisions previous to 15th July 1850 by section 1 of the General Police Act of 1850 (13 and 14 Vict., cap. 33).

(139.) Page [47], line 16, after “Scotland” insert ¹.

(140.) Page [47], at the bottom of the page insert the following note:—

¹ This act is repealed by Schedule Fifth of the Ballot Act, 1872.

(141.) Page [62], line 22 from bottom, after “1860” insert ¹.

(142.) Page [62], at the bottom of the page insert the following note :—

¹ See the Burgesses (Scotland) Act, 1876 (39 Vict., cap. 12).

(143.) Page [86], line 28, after “longer” insert the following :—

The Burghs (Division into Wards) Amendment Act, 1876 (39 and 40 Vict., cap. 25) appoints section 6 of the General Police Act, 1862, to be read and construed as if 5000 were substituted for 10,000.

(144.) Page [90], at the bottom of the page insert the following footnote :—

It has been decided in the case of *M'Donald v. Robertson*, 17th May 1876, Scot. Law Rep., Vol. XIII., p. 426, 3 Rennie, p. 645, that these provisions are not affected by the Ballot Act, and are still operative.

(145.) Page [94], at the bottom of the page insert the following note :—

See note, Additions and Corrections, No. (143).

(146.) Page [95], line 15, delete “75” and insert “76.”

(147.) Page [99], at the bottom of the page add the following note :—

Section 50 is repealed by section 2 of the General Police Amendment Act, 1878 (41 and 42 Vict., cap. 30), and section 3 of the latter act is substituted.

(148.) Page [100], line 23, after “Act” insert ¹.

(149.) Page [100], at the bottom of the page insert the following note :—

¹ Section 51 is repealed by section 2 of the General Police Amendment Act, 1878 (41 and 42 Vict., cap. 30), and section 4 of the latter act is substituted.

(150.) Page 189, line 16, after “Act” insert ¹.

(151.) At the bottom of the page insert the following :—

¹ But see Note, Additions and Corrections, No. (144).

OBSERVATIONS
ON THE LAW AND PRACTICE
IN REGARD TO
MUNICIPAL ELECTIONS
AND THE
CONDUCT OF THE BUSINESS OF TOWN
COUNCILS IN SCOTLAND.

I.—QUALIFICATION OF VOTERS.

1. In Royal and Parliamentary Burghs.

1. In every Royal Burgh in Scotland *which returns or contributes to return a member to Parliament*, the right of electing the town council belongs,—*First*, To all persons who are qualified, in respect of any premises within the royalty of the burgh, whether the royalty be original or extended, to vote in the election of a member of Parliament for the burgh, by virtue of the Reform Act of 1832, or the Reform Act of 1868,¹ and who

¹ The franchises in burghs are dependent upon the possession, by all persons not subject to any legal incapacity, of certain qualifications specified in the Reform Acts of 1832 and 1868. The time for judging as to the possession, by the person claiming to be registered as an elector, of the requisite qualifications,—whether these depend on the ownership or occupancy of premises, or on the age or capacity

are duly registered as voters in the registers then in force made up in terms of the Registration Acts; and,

of the claimant,—is the date “when the sheriff proceeds to consider his claim for registration.”

The qualifications for the franchise in burghs, under the Reform Act of 1832, are the following :—

First, OWNERSHIP, for a period of twelve calendar months previous to the last day of July, of any land with a building thereon, or of any house, warehouse, counting-house, shop, or other building within the limits of the burgh, of the yearly value of £10.

1. This qualification extends to the husbands of true owners in the lifetime of their wives, or after their death, if then holding such property by the courtesy of Scotland, and to liferenters legal and conventional, if their right be indefeasible,—such persons being in law considered owners.
2. Every joint owner of such subjects of the yearly value of £20 and upwards, whose interest is worth £10 a-year, is also entitled to be registered in respect of such joint ownership; but such joint owner must occupy the subjects claimed on.

Second, OCCUPANCY, for a period of twelve calendar months prior to the last day of July, of subjects within burgh of the kind above described, and of the yearly value of £10.

Lodgers were generally admitted under this qualification.

Every joint occupant of such subjects of the yearly value of £20 and upwards, whose interest is worth £10 a-year, is also entitled to be registered in respect of such joint occupancy.

Both these franchises are conditional upon :—

1. The non-receipt of parochial relief within twelve calendar months previous to 31st July.
2. Payment on or before 20th July of all assessed taxes payable by the owner or occupier, in respect of the property from which he derives his right previous to 6th April preceding.
3. Residence for six calendar months next previous to 31st July within the burgh, or within seven statute miles of some part thereof, such distance being determinable in the way and manner pointed out in the 34th section of the Act 19 and 20 Vict., c. 58. (The Burgh Registration Act, 1856.)

The new franchises introduced by the Reform Act of 1868 are expressly declared to be in addition to, and not in substitution for, any franchises previously existing, but so that no person shall vote for the same place in respect of more than one qualification. These new franchises are :—

First, The OCCUPANCY as OWNER or TENANT, for a period of not less than twelve calendar months preceding 31st July, of any *dwelling-house* within the burgh, subject to the following conditions :—

1. Actual residence for the statutory period of twelve months in the dwelling-house on which the vote is claimed, or in it for a portion of the year, and in another dwelling-house

Second, To all persons who are possessed of the qualifications described in the Reform Acts of 1832 and 1868, in

within the burgh, if the two are occupied in immediate succession.

2. Non-exemption during these twelve months from payment of poor-rates on the ground of inability to pay.
3. Payment, on or before 20th June, of all poor-rates (if any) that have become payable by the owner or occupant in respect of the said dwelling-house, or as an inhabitant of any parish in the burgh up to the preceding 15th of May.
4. Non-receipt of parochial relief within the twelve calendar months preceding 31st July.

Joint occupancy of any dwelling-house is declared to give no title to the new franchise created by the Reform Act of 1868.

Second, The OCCUPANCY as a lodger in the same burgh separately, and as sole tenant for the twelve months preceding 31st July, of lodgings of a clear yearly value, if let unfurnished, of £10 or upwards, combined with residence in such lodgings during the twelve months immediately preceding 31st July. Lodgers are not registered as electors unless they claim, year by year, to be so.

The following classes of individuals and official persons are disqualified from exercising the franchise in burghs under both of these Acts :—

1. Minors.
2. Women.
3. Aliens, unless they have been naturalised, and have taken the oath prescribed by 7 and 8 Vict., c. 66.
4. Fatuous or insane persons, but not blind, deaf, or dumb.
5. Peers (British, Scottish, or Irish), [Cay, 405-6. Nicolson, 24,] but not their sons. [2 and 3 Will. IV., c. 65, section 37.]
6. Sheriffs, Town Clerks, and Town Clerks Depute in burgh elections. [See 2 and 3 William IV., c. 65, sec. 36.]
7. Assessors under the Valuation and Registration Acts in parliamentary and municipal elections for the burgh. [19 and 20 Vict., c. 58, section 8.]
8. Persons convicted of bribery, treating, or undue influence at an election. [17 and 18 Vict., c. 102, sec. 6, and the Parliamentary Elections Act, 1868.]

The Burgh Reform Act, 3 and 4 William IV., c. 76, prescribed as a condition of qualification to exercise the municipal franchise, residence within the royalty of the burgh, or within seven statute miles thereof, for six calendar months previous to 30th June—*i.e.*, a month earlier than the time required with reference to the parliamentary franchise. It also declared that no one should be entitled to vote who had been a pensioner of any corporation within twelve months of any annual election. Neither of these requirements is to be found in the Reform Act of 1832 or 1868, and as “The Municipal Elections Amendment (Scotland) Act, 1868,” enacts that those who

respect of the premises therein described, within the royalty of any such royal burgh, where the limits thereof at any point or points extend beyond the parliamentary boundaries of such burgh, or within the municipal boundaries of any such royal burgh, where the same have been extended under any general¹ or local act beyond the limits of the royalty, original or extended, or the parliamentary boundaries of such burgh.

These qualifications are prescribed by the Act 3 and 4 William IV., c. 76, section 1, and by "The Municipal Elections Amendment (Scotland) Act, 1868," section 3. But it is provided by section 3 of the latter act, that nothing therein contained shall be construed to confer the right of voting for town councillors on any person, in respect of premises situated beyond the municipal boundaries of any royal burgh, as such boundaries may be limited and defined by any act of Parliament.

2. In every Royal Burgh *not now entitled to send or contribute to send a member to Parliament*, the right of electing the town council belongs to all persons who are possessed of the qualifications for the burgh franchise described in the Reform Act of 1832, and in the Reform Act of 1868, in respect of the premises therein described, within the royalty of such royal burgh.²

These qualifications are prescribed by "The Municipal Elections Amendment (Scotland) Act, 1868," section 4.

If any such burgh is extended beyond the royalty under the provisions of the Acts 20 and 21 Victoria, cap. 70, and 24 and 25 Victoria, cap. 36, are the persons

possess the qualifications prescribed by the Reform Acts of 1832 and 1868 shall enjoy the municipal franchise, it may be held that neither of the provisions of the Act 3 and 4 William IV., c. 76, above referred to, is now operative.

¹ See the Acts 20 and 21 Victoria, c. 70, entitled "An Act to Provide for the Extension of the Boundaries of Burghs in Scotland," &c., and 24 and 25 Victoria, c. 36, entitled "An Act to amend the Boundaries of Burghs Extension (Scotland) Act."

² See the notes to the preceding Observation.

within the district added to the burgh, and who, if within the royalty, would be entitled to vote in the election of town councillors, admissible as municipal electors, or must they be held to be excluded by reason of their being beyond the royalty, though within the burgh? It appears to the writer that they are entitled to exercise the municipal franchise. The "Burgh Reform Act," 3 and 4 William IV., cap. 76,¹ and "The Municipal Elections Amendment (Scotland) Act, 1868,"² no doubt limit the franchise to owners or occupiers of property "within the royalty" of such burghs, and "The Municipal Elections Amendment (Scotland) Act, 1870,"³ provides for the municipal register in such burghs containing only the names "of all persons who may be entitled to vote in the election of councillors for such burghs under the provisions of" these acts. But the Act 20 and 21 Victoria, cap. 70,⁴ enacts that the boundaries of the added district, set out and authenticated in the manner therein provided, shall thereafter, under the conditions therein referred to, "be the boundaries of the burgh for all municipal purposes only, including the right of voting for town councillors and all matters connected with police, and the district comprehended within such boundaries shall cease to belong to or form part of the county in which it is locally situated, and shall belong to and form part of such burgh as regards all local purposes, rights, and obligations; provided always that nothing in this act contained shall affect in any way the right of voting for a representative in Parliament." The object of the statute last referred to was to put the added district for all municipal and police purposes in the same position as the other portion of the burgh. It expressly includes the right of voting for town councillors as one of the rights to be enjoyed by the district added, and therefore it may be held to incorporate the district with the royalty to the effect of securing for every portion of the extended burgh equal rights in the election of town councillors.

¹ Section 1. ² Section 4. ³ Section 6. ⁴ Section 3.

3. In every Parliamentary Burgh, the right of electing the town council belongs,—*First*, To all persons who are possessed of the qualification to vote for a member of parliament for such burgh, whose names are on the register completed in terms of the Registration Acts; and, *Second*, To all persons who are possessed of the qualifications described in the Reform Act of 1832, and the Reform Act of 1868, in respect of the premises therein described within the municipal boundaries of such burgh, where the same have been extended under any general or local act beyond the limits of the parliamentary boundaries of such burgh.

These qualifications are prescribed by “The Municipal Elections Amendment (Scotland) Act, 1868,” section 5.¹

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

4. In Burghs of Regality and Barony, not being parliamentary burghs, the right to elect the town council is vested sometimes in the superior, and sometimes in the persons who possess the qualifications specified in the charter or act of Parliament by which each burgh has been erected, or under which its affairs are administered. These qualifications are various and arbitrary, and do not admit of classification.

3. In Burghs and Places subject to “The General Police and Improvement (Scotland) Act, 1850,” 13 & 14 Vict., cap. 33, or to “The General Police and Improvement (Scotland) Act, 1862,” and amending Acts.

5. In all burghs in which commissioners have to be elected under the provisions of either of the General Police Acts, the right of election is in the householders, *i.e.*, the male occupiers of dwelling-houses or other heritable subjects of the yearly value of £4 or upwards, as appearing in the valuation roll. Occupiers in the sense of these acts do not include lodgers or persons in the occupation, as tenants, of furnished houses let

¹ See foot-notes, pp. 1-4.

for a less period than a year, but include the persons by whom such furnished houses are let.

Under these acts, both of which confer the right to vote on all householders, a privilege, which has no analogy in the parliamentary or municipal franchise above referred to, is conferred upon companies and co-partnerships occupying houses or other heritable subjects of the yearly value of £4 or upwards, so as to afford more than one qualification of £4. These companies or copartnerships may grant authority in writing to any one or more of their partners to vote; and these partners are deemed to be householders, and are entitled to vote accordingly, subject always to the provisions (1) that no company can confer a right to vote by more than one partner in respect of each qualification of £4 afforded by the premises in its occupancy; and (2) that not more than six partners of any company can vote in respect of any premises occupied by it.¹

No householder is entitled to vote in the election of commissioners who has been exempted from payment of the whole or any part of his rates or assessment under the act of 1850 or 1862 on the ground of poverty or inability to pay, or who has not paid all rates or assessments due and payable by him under these acts at the time of so voting,² whether such arrear is due by himself or by any company or co-partnership by which he is authorised to vote. A certificate under the hand of the collector is sufficient evidence of such arrear or exemption.³ Every vote given by persons so exempted or

¹ Section 12 of the General Police Act of 1850, section 27 of the General Police Act of 1862, and section 4 of the "General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1868."

² Section 5 of the Police Amendment Act, 1868.

³ Section 34 of The General Police Act of 1850, and section 53 of the General Police Act of 1862. The former section provided that the arrear must have been owing for a month, and must have been demanded after it became due. The latter section provided that the arrears "shall at the time of the election be owing, and shall have been demanded." The provisions of The Police Amendment Act, 1868, are as stated in the text.

See No. 14 of these Observations.

in arrear is null and void. No householder is entitled to have or give more than one vote in any election.¹

These qualifications are prescribed by the Police Act of 1850, section 30, explained by sections 2, 12, and 34; and by the Police Act of 1862, section 47, explained by sections 3, 27, and 53; as both of these acts are amended by the "General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1868."

While "The Ballot Act, 1872," requires all municipal elections, including the election of commissioners of police under these acts, to be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in schedule (C.) of the act 3 and 4 William IV., c. 76, are directed to be conducted by the acts in force at the time of the passing of the Ballot Act, as thereby amended, and enacts that all such acts shall apply to such elections accordingly, it does not affect the qualifications of the persons entitled to vote at such elections.² These qualifications, therefore, remain unaltered.

6. Where the powers and provisions of either of the General Police Acts of 1850 or 1862 have been adopted, in whole or in part, in any Burgh of Regality or Barony having magistrates and a council, not being a burgh in which, as bounded for the purposes of either of these acts, there is included territory situated in a different county from that in which such burgh as previously bounded was situated, and where the householders present at the meeting which adopted the general act, or at any adjourned meeting, determined that the magistrates and council of the burgh for the time being should always be commissioners for carrying the adopted act into operation, such determination is final, and no special election of commissioners is necessary.³ These burghs

¹ See section 5 of the Police Amendment Act, 1868.

² See Memorial and Opinion, Appendix No. XV., pp. [179], [180], [188]. See also No. 133 of these Observations.

³ See section 39 of the General Police Act of 1850, and section 41 of the General Police Act of 1862.

are "subject to" the General Police Act so adopted, and it seems to be the fair meaning of the Ballot Act that all persons who are to enforce the provisions of the adopted act in every such burgh shall be elected in the way and manner prescribed by the Ballot Act. But the qualification of the electors, as otherwise regulated, remains unaffected. This was the view taken, in 1872, by Mr A. R. Clark, then Solicitor-General and now Dean of Faculty, with reference to Ardrossan and Pollockshaws; and in 1874 by him and Mr J. B. Balfour, Advocate, with reference to Lerwick.¹

7. The same principle appears to apply equally to the case of a burgh which, having commissioners or trustees of police under the provisions of a local act of Parliament, has adopted the General Police Act of 1862 in part. In such a burgh the commissioners or trustees of police under the local act are the commissioners for carrying the General Police Act, so far as adopted, into operation, and no special election of commissioners of police under the latter act is necessary.² Such a burgh is, however, "subject to" the Police Act of 1862; and the election of commissioners or trustees of police under the local act should be conducted in the way and manner directed by the Ballot Act, leaving unaffected the qualification of the electors and other matters which do not relate to the carrying out of the election.³

¹ See the opinions of Mr A. R. Clark, then Solicitor-General and now Dean of Faculty, in regard to the burghs of Ardrossan and Pollockshaws, and of him and Mr Balfour in regard to the Burgh of Lerwick, all quoted in the foot-note to No. 135 of these Observations. See also Memorial and Opinion, Appendix XV., pp. [179], [180], and [188].

² See Section 42 of the General Police Act of 1862.

³ See Observations by Lord Gifford and the Lord President on the meaning of the word "election" under the Ballot Act, in the case of *Hamilton v. the Police Commissioners of Dunoon*, 15th January 1875, Session Cases (fourth series), vol. ii. pp. 303, 309, and 310.

II.—REGISTERS OF VOTERS.

1. In Royal and Parliamentary Burghs.

8. In every Royal Burgh *which returns or contributes to return a member to Parliament*, the town clerk must, immediately after the completion of the register of voters for members of parliament in terms of the Registration Acts, make up and complete the roll of persons entitled to vote in the election of the town council of the burgh. This roll must be completed on or before the 31st day of October in each year, and is the register of voters at the next ensuing election of town councillors. Where the parliamentary and municipal boundaries of any royal burgh are the same, the roll of municipal electors is made up and completed by the town clerk certifying at the end of a copy of the parliamentary register for the burgh that such register is the roll of persons entitled to vote at the next ensuing election of the town council.¹

9. In some burghs, such as Dunfermline, Dundee, and Arbroath, a difficulty has arisen from the fact that the boundaries of the royalty, ancient or extended, go beyond the parliamentary boundaries, while no provision has been made for placing upon the municipal register the names of those persons who possess the qualifications for the municipal franchise in respect of premises situated within those portions of the royalty which extend beyond the parliamentary boundaries.²

¹ See sections 6 and 8 of "The Municipal Elections Amendment (Scotland) Act, 1868."

² A similar difficulty existed in Glasgow with reference to Springburn till that district was annexed to the city by "The Glasgow Municipal Act, 1872," section 14 of which provided for the making up of a list of the persons in the district entitled to vote in municipal elections.

In the absence of any enactment on the subject, two courses have been suggested to meet the difficulty. The first is, that the town clerk should add to the municipal register the names of such persons as may, in his judgment, possess the requisite qualification. The other is, that persons possessing the requisite qualification should lodge with the town clerk a claim to be placed on the municipal register, and that thereafter the procedure prescribed by sections 2 and 3 of the Act 3 and 4 William IV. cap. 76, with reference to royal burghs which do not contribute to send a member to parliament, should be followed out. Both these courses were indicated to the Lord Advocate (now Lord Young) in a memorial submitted to him by the town council and town clerk of Dunfermline, in August 1870, and his opinion was expressed in the following terms: “‘The Municipal Elections Act, 1868,’ is manifestly defective, inasmuch as it makes no provision for the registration of the newly enfranchised, viz., the electors of royal burghs whose qualifications are without the parliamentary boundaries. But these electors, being enfranchised, must be put upon the register somehow, and of the two modes here suggested I recommend the second. It is reasonable in itself, and follows the rule in the most analogous cases, while the course suggested in the first query [*i.e.*, the former of the two courses above indicated] is arbitrary, and in itself objectionable.” The difficulty is one that demands a legislative remedy. But until that has been provided, the simplest and most satisfactory course is to treat the portions of the royalty beyond the parliamentary boundary as a royal burgh not entitled to send a member to Parliament, and to apply to them the provisions of section 6 of “The Municipal Elections Amendment (Scotland) Act, 1870,”—which were not brought under the consideration of the Lord Advocate when he gave the above opinion.

A similar difficulty arises in cases in which the boundaries of a burgh are extended beyond the parliamentary

limits under the provisions of the Acts 20 and 21 Victoria, cap. 70, and 24 and 25 Victoria, cap. 36. The district added is by section 3 of the former Act declared to be a part of the burgh "for all municipal purposes only, including the right of voting for town councillors, and all matters connected with police." No provisions have, however, been made for placing on the municipal register the names of electors whose qualifications are derived from property beyond the parliamentary boundaries of the burgh, but within the district added to it. That they are entitled to vote is beyond question, but to enable them to do so they must be placed on the register; and the course prescribed by section 6 of "The Municipal Elections Amendment (Scotland) Act, 1870," is, in the absence of express statutory provision, at once the simplest and least objectionable.

Were the county and burgh franchises the same, these difficulties would be removed by a simple enactment that the town clerk should transfer from the county register to the municipal register the names of those persons qualified in respect of subjects within the portions of the royalty outside of the parliamentary boundaries, or in the district comprehended within the boundaries of the burgh as extended under the acts above referred to.

10. In every Royal Burgh in Scotland which *does not return or contribute to return a member to Parliament*, the assessor of the burgh must, on or before 15th September in each year, make out a list of all persons who may be entitled to vote in the election of councillors for the burgh under the provisions of "The Municipal Elections Amendment (Scotland) Act, 1868," according to the form No. I. of schedule (A.) to the Burgh Registration Act, 19 & 20 Vict., c. 58. Thereupon the same procedure must be followed with respect to the preparation and publication of every such list, and the completion and revision of the register of voters for the burgh, as is provided by the Burgh Registration Act, as amended by the Reform Act of

1868, with respect to the lists and registers of voters to be made out and completed under the provisions and for the purposes of these acts. The list of voters for the burgh so completed and revised, when signed by the town clerk, is the register of persons entitled to vote at the election of town councillors for the succeeding year. The register must be printed, and copies kept by the town clerk and delivered to persons applying for them, in the manner and on the terms provided by the Burgh Registration Act. The whole cost of making up and completing, revising and printing the register of voters in such burgh, or incident thereto, must be ascertained and fixed, and the amount assessed, levied, and collected in the same manner as the expenses attending the annual registration under the Burgh Registration Act are, by that act, appointed to be ascertained, fixed, assessed, levied, and collected; and the provisions of that act are applicable to the costs of registration in such burgh.¹

When the boundaries of any such burgh are extended beyond the royalty under the provisions of the Acts 20 and 21 Victoria, cap. 70, and 24 and 25 Victoria, cap. 36, the register of voters should, as it appears to the writer, for the reasons already stated, include the names of all persons within the extended burgh possessing the qualifications for the burgh franchise.²

11. In every Parliamentary Burgh, the register of persons qualified to vote for a member of Parliament for such burgh, completed in terms of the Registration Acts then in force, is the register of electors of councillors for such burgh.³

No provision has been made for placing on the municipal register the names of such persons as possess the qualifi-

¹ See "The Municipal Elections Amendment (Scotland) Act, 1870," sections 6 and 7.

² See No. 2 of these Observations.

³ See No. 3 of these Observations, and foot-notes pp. 1-4.

See sections 5 and 8 of "The Municipal Elections Amendment (Scotland) Act, 1868."

cations for the municipal franchise, in respect of premises within the municipal boundaries of any burgh, in so far as such boundaries have been or may be extended beyond the limits of the parliamentary boundaries of such burgh, under the Acts 20 and 21 Victoria, cap. 70, and 24 and 25 Victoria, cap. 36. In such cases, as in the case of the royal burghs similarly situated, the simplest and most satisfactory course seems to be to treat the added district as if it were a royal burgh not entitled to send a member to Parliament, and to apply to it the provisions of section 6 of "The Municipal Elections Amendment (Scotland) Act, 1870."¹

12. At every election of town councillors for any Royal or Parliamentary burgh, the register of voters made up and completed in the way and manner above described must be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications annexed to their names respectively in the register in force at the time of such election; and such persons cannot be required to take any oath or solemn affirmation. They may be required, however, by any elector on the register, to make a declaration in the form of schedule (A.) annexed to "The Municipal Elections Amendment (Scotland) Act, 1868."²

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

13. In Burghs of Regality and Barony, not being Parliamentary burghs, the list or register of persons entitled to vote in the election of town councillors, where the councillors are not nominated by the superior, is made up in the way and manner prescribed by the charter or act of

¹ See No. 9 of these Observations.

² See section 8 of "The Municipal Elections Amendment (Scotland) Act, 1868."

See also Form of Declaration, Appendix XVI., No. 16, p. [208.]

Parliament by which each burgh has been erected, or under which its affairs are administered.

When no directions are given as to the mode of making up the list or register of voters, the town clerk or other official should make up the roll openly, and after public intimation of his proceedings, adopting as far as possible the course prescribed by statute for Royal Burghs which do not send or contribute to send a member to Parliament.¹

3. In Burghs and Places subject to the General Police Act of 1850 or 1862, and amending Acts.

14. To ascertain who are the householders entitled to vote at all elections of commissioners of police under the provisions of the General Police Act of 1850 or 1862, in burghs or places in which commissioners fall to be elected, the chief or senior magistrate in the case of a royal or parliamentary burgh, or if otherwise the sheriff or sheriff-substitute of the county in which such burgh or place is situated, is required to direct the collectors of the assessment for the poor in burghs or places subject to the act of 1850, and the assessors under the Valuation Acts within burghs or places subject to the act of 1862, to furnish him within fourteen days thereafter with a list of the names of all householders within such burgh or place, distinguishing the amount of rental at which each person is assessed. This list, the collectors in the one case and the assessors in the other, are required to make and certify on payment of a fee of not more than one shilling for each one hundred names, and the list so furnished is declared to be sufficient proof of the qualification of the householders named in it. In cases where it is expedient to obtain such a list otherwise than from the

¹ See No. 10 of these Observations.

See also the opinion of Mr. A. R. Clark, Dean of Faculty, and Mr. J. B. Balfour, Advocate, as to the burgh of Lerwick, dated November 1874, quoted in the foot-note to No. 135 of these Observations.

collector's books, it is competent for the magistrate or sheriff, in burghs or places subject to the act of 1850, to cause an accurate list to be taken and made up by persons to be appointed for that purpose. The expense so incurred under either act is chargeable against the assessments levied under the authority of the act.¹

In addition to the list of householders made up in the manner before explained, it is necessary, with a view to the election of commissioners in burghs and places in which assessments or rates have been imposed under either of the General Police Acts, to obtain from the collector of the commissioners a list, certified under his hand, containing the name of every householder who—(1) has been exempted from payment of the whole or any part of his rates or assessment under the act, on the ground of poverty or inability to pay, or who (2) has not paid all rates or assessments due and payable by him under the act at the time, whether such arrear is due by himself or by any company or copartnership by whom he is authorised to vote. The certificate of the collector of the commissioners is declared by the acts both of 1850 and 1862 to be sufficient evidence of such exemption or arrears, and no householder so certified is entitled to vote in the election, unless the arrear appearing to be due by him is previously paid. Any vote given by a householder so disqualified is declared by the "General Police and Improvement (Scotland) Act, 1862, Amendment Act," 1868, to be null and void. It is therefore the duty of the returning-officer to cause the names of all persons so certified by the collector of the com-

¹ See "The General Police Act of 1850," sections 29, 30, and 33, and section 8; and "The General Police and Improvement (Scotland) Act, 1862," sections 46, 47, 51, and 53, and section 24.

Sections 8, 29, and 30 of the General Police Act of 1850, and sections 46, 47, and 50 of the General Police Act of 1862, are repealed by schedule fifth of the Ballot Act, in so far as inconsistent with that act and its schedules. But the provisions of these sections in regard to the matters referred to in the text are not inconsistent with the Ballot Act, and consequently remain unaffected

missioners to have been exempted from payment of rates or assessments to be struck off the list of householders entitled to vote, and to cause the names of all persons similarly certified as in arrear to be marked on the list of householders in such a way as to ensure the rejection of the votes of such householders as may present themselves and claim to vote while any part of the rates and assessments due and payable by them is unpaid.¹

In large burghs and places subject to the General Police Act of 1850 or 1862, and especially in those which are divided into wards, the election of commissioners is greatly facilitated by the preparation of a complete and accurate list of householders (excluding those who have been relieved from, or are in arrears of, rates or assessment as before explained) arranged in the alphabetical order of the names of the electors, or in the alphabetical order of the streets and squares, and having a consecutive number prefixed to the name of each householder. Previous to the passing of the Ballot Act, this work was usually entrusted by the chief or senior magistrate or sheriff, as the case might be, to the clerk of the commissioners. The returning officer may, however, employ any person he thinks proper to prepare the list. But in so far as he employs the clerk to the commissioners to do so, or to act as his agent in the conduct of the elections, the clerk will be entitled to remuneration, unless his salary as clerk is expressly declared to include such service.

The question whether the Ballot Act transfers the duty of acting as returning officer in all elections of commissioners after the first (including that of having lists of householders prepared) from the sheriffs or sheriffs-substitute of counties to the chief magistrates of burghs and places subject to the General Police Act of 1850 or 1862 (other than royal and parliamentary burghs), is considered in No. 132 of these Observations.

¹ See No. 5 of these Observations

15. In such burghs of this kind as have adopted the Police Act of 1850 or 1862, and resolved that the magistrates and council, or commissioners, or trustees, acting under the charter or local act, by which each burgh has been erected, or under which its affairs are administered, shall be commissioners of police,¹ the list or register of voters must continue to be made up in the way and manner prescribed by the charter or act of Parliament under which the town council, or commissioners, or trustees, of each such burgh are elected.²

Where no directions are given as to the mode of making up the list or register of voters, the same course should be adopted as is suggested in No. 13 of these Observations.

¹ Being the burghs referred to in Nos. 6 and 7 of these Observations.

² See Opinions of Mr A. R. Clark, then Solicitor-General, and now Dean of Faculty, in regard to the burghs of Ardrossan and Pollockshaws; and of him and Mr J. B. Balfour, Advocate, in regard to the burgh of Lerwick, all quoted in the foot-note to No. 135 of these Observations.

III.—DIVISION OF BURGHS INTO WARDS.

1. In Royal and Parliamentary Burghs.

16. By virtue of the act 3 and 4 Will. IV., c. 76, and of a royal commission issued on 15th June 1833 to enquire into and report upon the condition of the several burghs and towns in Scotland, Edinburgh, Glasgow, Aberdeen, Dundee, Perth, Dunfermline, Dumfries, and Inverness (being the burghs specified in schedule (C.) of the act 3 and 4 Will. IV., c. 76), were divided into wards or districts, and the number of councillors to be chosen by each ward or district was fixed. This division, and the number of councillors to be annually elected in each ward, were reported by the commissioners to the Privy Council, and thereafter published by royal proclamation dated 16th October 1833. Various changes on these arrangements have since been made under local acts.¹ But the extension of the franchise effected by the Reform Act of 1868 necessitated a re-division of the wards or districts in all burghs which were at that time divided into wards. "The Municipal Elections Amendment (Scotland) Act, 1868," accordingly, by section 16, enacted that as soon as conveniently might be after its passing [on 31st July 1868], every burgh then divided into wards for the purpose of electing town councillors should be re-divided into the same number of wards, arranged with the view of accommodating the enlarged constituency created by the Reform Act of 1868; and for this purpose the chief magistrate of each of these burghs, the sheriff of the county in which the burgh is situated (excluding his substitute), and a person to be appointed by one of Her Majesty's principal secretaries of state, or any two of them, were required to re-divide the burgh into the same number

¹ See also No. 17 of these Observations.

of wards into which it was then divided, each ward being numbered and bearing a distinctive name or number; and specific directions were given as to the principles upon which the re-division should be made, and the manner in which it should be effected. Upon such re-division being made and approved of by one of Her Majesty's principal secretaries of state, and published, it was declared to take effect, and the new boundaries were appointed, after the expiry of the year 1868, to be substituted for the old boundaries of wards, in making up the rolls of parliamentary and municipal electors for the burgh. By section 17 of the same act, the town council of any royal or parliamentary burgh, having by the census last taken a population of above ten thousand persons, and not then divided into wards, is authorised to resolve, by a majority of not less than two-thirds of their number, that the burgh shall be divided into wards for the purpose of parliamentary and municipal elections; and upon such resolution being adopted, the chief magistrate of the burgh, the sheriff of the county in which the burgh is situated (excluding his substitute), and a person to be appointed by one of Her Majesty's principal secretaries of state, or any two of them, are required to divide the burgh into wards, each ward being numbered and having a distinctive name or number. In fixing the number and determining the boundaries of the wards, regard is appointed to be had to the number of town councillors in the burgh, and to the number of municipal electors, and also to the value of the property as appearing on the valuation roll. The parties appointed to make the division into wards are required to cause the proposed division to be delineated on a plan, which shall be open to the inspection of all persons concerned for the space of fourteen days, and notice where the plan is to be seen must be given previous to the first of these fourteen days by advertisement, in one or more newspapers published or circulating within the burgh or county in which the burgh is situated. Upon a day after the expiry of the fourteen days to be specified

in the advertisement, the same parties are required to hear all concerned for their interests, and thereupon the proposed division must be finally adjusted by the parties by whom the division is to be made, who are also required to fix and determine the wards to which the existing town councillors shall be appointed, and the order in which they shall retire by rotation. The result must be reported to one of Her Majesty's principal secretaries of state, and on the report being approved of by him the division into wards must be published once at least in the *Edinburgh Gazette*, and in one newspaper published or circulating within the burgh or county in which the burgh is situated. The boundaries of wards having been so approved of and published are appointed to take effect and to be the boundaries of wards in making up the rolls of parliamentary and municipal electors for the burgh.

17. When the boundaries of any royal or parliamentary burgh are extended under the provisions of the Act 20 and 21 Victoria, c. 70, and such burgh has been or shall be divided into wards, the sheriff of the county in which such burgh is situated, or any of his substitutes, is empowered, by the Act 24 and 25 Victoria, c. 36, sections 1 and 2, on the application of the town council, to form the district comprehended within such extended boundaries into a ward or wards, or to annex such district or any part thereof to any one or more of the existing wards of such burgh, and to fix and arrange the limits of such extended wards, and the number of councillors to be elected for each existing and extended ward of such burgh, in such manner as he may think fit. On such formation or annexation and arrangement of wards being made and completed, a notice, signed by the sheriff or sheriff-substitute, specifying the limits of the extended wards, and the number of councillors to be elected for each existing and extended ward of the burgh, must be published once in the *Edinburgh Gazette*, and once in each

of two successive weeks in a newspaper published in the burgh; or if no newspaper be published in it, then in a newspaper published in the county in which the burgh is situated. Thereafter the qualified electors in all such wards, whose names are on the list or roll of electors of the burgh in force for the time being,¹ will be entitled to vote in the election of councillors for the burgh for as many qualified persons to be councillors in and for such wards respectively as are specified in such notice, in the manner provided by the Acts 3 and 4 Will. IV., c. 76 and 77. All orders or deliverances made or pronounced by the sheriff or sheriff-substitute in the execution of the act 24 and 25 Victoria, c. 36, are final, and not subject to review.²

2. In Burghs and Places subject to the General Police Act of 1850 or 1862.

18. In any burgh other than a royal or parliamentary burgh, having a population exceeding ten thousand according to the census last taken at the time, in which the provisions of either of these acts have been adopted in whole or in part, and which has not been divided into wards for the purposes of the adopted act, the sheriff may, on the application from time to time of the commissioners of police, divide the burgh into such number of wards as he finds to be proper, and define their boundaries, and fix the number of commissioners to be elected for each. Thereafter, and except as respects the number of commissioners, all the provisions of the adopted act with respect to the election and rotation of commissioners for burghs originally divided into wards apply to the election and rotation of commissioners for burghs so divided into wards by the sheriff. But the commissioners in office at the time of such division remain in office until the expiration of the year of office then current.³

¹ But see Nos. 9 and 11 of these Observations.

² Section 2 of 24 and 25 Victoria, c. 36.

³ See "The General Police and Improvement (Scotland) Act, 1862, Amendment Act," 1868, section 6.

IV.—QUALIFICATIONS OF TOWN COUNCILLORS AND COMMISSIONERS OF POLICE.

1. Of Town Councillors in Royal and Parliamentary Burghs.

19. Such persons only are eligible for the office of town councillor in any royal or parliamentary burgh³ as are entitled to vote in the election of town councillors in such burgh and possess the following qualification:—

(1.) In Royal Burghs *which return or contribute to return a member to Parliament*,—Residence within the boundaries assigned to such burghs by the Reform Act of 1832, or within the royalty, whether original or extended, where the limits thereof at any point extend beyond the parliamentary boundaries, or within the municipal boundaries where the same have been extended under any general or local act beyond the limits of the royalty original or extended, or the parliamentary boundaries.¹ Or, carrying on business within the royalty, whether original or extended.²

(2.) In Royal Burghs *which do not return or contribute to return a member to Parliament*,—Residence or carrying on business personally within the royalty,³ whether original or extended.⁴

(3.) In Parliamentary Burghs.—Residence or carrying

¹ See the Acts 3 and 4 Will. IV., c. 76, section 8, and "The Municipal Elections Amendment (Scotland) Act, 1868," section 3.

² See the Acts 20 and 21 Victoria, c. 70, and 24 and 25 Victoria, c. 38.

See also Nos. 8, 9, 16, and 17 of these Observations.

³ See the Acts 3 and 4 Will. IV., c. 76, section 11, and "The Municipal Elections Amendment (Scotland) Act, 1868," section 4, and "The Municipal Elections Amendment (Scotland) Act, 1870," section 6.

See also No. 10 of these Observations.

⁴ See No. 2 of these Observations.

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on business personally within the boundaries assigned to such burghs by the Reform Act of 1832, or within the municipal boundaries, where these boundaries have been extended under any general or local act beyond the parliamentary boundaries.¹

2. Of Town Councillors in Burghs of Regality and Barony, &c., not being Parliamentary Burghs.

20. In Burghs of Regality and Barony not being parliamentary burghs, the qualifications of town councillors, like the qualifications of electors, are prescribed by the charter or act of Parliament by which each burgh has been erected, or under which its affairs are administered.

21. In such burghs of this kind as have adopted the Police Act of 1850 or 1862, and resolved that the magistrates and council, or commissioners, or trustees, acting under the charter or local act, by which each burgh has been erected, or under which its affairs are administered, shall be commissioners of police,² the qualifications of the town councillors, or commissioners, or trustees, as prescribed by the charter or act of Parliament by which each burgh has been erected, or under which its affairs are administered, are not affected by the provisions of the Ballot Act.

3. Of Commissioners of Police elected under the General Police Act of 1850 or 1862.

22. Every householder within the burgh or place in which either of the General Police Acts of 1850 or 1862 has been adopted, in whole or in part, and who is entitled to vote in the election of commissioners under these acts respectively, is eligible for election as a commissioner.³

¹ See the Act 3 and 4 Will. IV., c. 77, sections 4 and 9, and the Municipal Elections Amendment (Scotland) Act, 1868, section 5. See also Nos. 11, 16, and 17 of these Observations.

² See foot-note 2, p. 23.

³ Being the burghs referred to in Nos. 6 and 7 of these Observations.

⁴ See No. 5 of these Observations.

V.—ANNUAL RETIREMENT FROM OFFICE OF TOWN COUNCILLORS AND COMMISSIONERS OF POLICE.

1. Of Councillors in Royal and Parliamentary Burghs.

23. Upon the first Tuesday in November in every year, one-third, or a number as near as may be to one-third, of the whole council of every burgh is required to go out of office, and the third which falls to retire must consist of the councillors who have been longest in office. But the councillors who so retire may be immediately re-elected.¹

No difficulty arises in giving effect to this requirement when a third of the council in a burgh which is not divided into wards, or a third of the councillors for every ward in a burgh which is divided into wards, has been elected in three successive years, and when the provost and treasurer have been elected to these offices respectively, as well as to the office of councillor, in the first of these years. In that case, the third which was elected in the first of the three years retires first, the third elected in the second of the three years retires next, and the remaining third retires last. But disturbing circumstances often occur to interfere with this simple rotation, and these will have to be noticed afterwards, in considering who are the parties, under such circumstances, to be included in the third who fall to retire in each year.

¹ See the Acts 3 and 4 William IV., c. 76, section 16; and 3 and 4 William IV., c. 77, section 12.

In 1835, the Commissioners on Municipal Corporations in Scotland recommended as follows:—"As only one-third of the whole council goes annually out of office, and the remaining two-thirds may be presumed to be sufficiently acquainted with the affairs of the burgh, we are of opinion that it would tend to check the hazard of factious combinations, that no councillor so retiring should be again eligible till after the lapse of one year."—General Report, p. 96.

2. Of Councillors in Burghs of Regality and Barony, &c., not being Parliamentary Burghs.

24. In Burghs of Regality and Barony, not being parliamentary burghs, there is no general rule either as to the proportion of councillors who retire, or as to the time at which they retire. These matters are regulated by the charter or act of Parliament by which each burgh has been erected, or under which its affairs are administered.

3. Of Commissioners of Police in Burghs and Places subject to the General Police Act of 1850 or 1862.

25. One-third of the commissioners elected under the provisions of these acts respectively in any burgh not divided into wards, and one-third of the commissioners similarly elected for each ward of every burgh which is divided into wards, are required to go annually out of office on the same day of the month in each year as that on which the first election of commissioners under these acts took place in these burghs respectively, or on the next lawful day thereafter.¹ The third of the commissioners who so retire, are, by "The General Police Act, 1850," declared to consist "in each case of those who are the highest on the list or lists of commissioners for the time, made up in the manner afterwards described."² By "The General Police Act, 1862," the third who have to retire at the expiration of the first year after the first election under the act are appointed to consist of the commissioners who at the first election had the smallest number of votes, and, when the burgh is divided into wards, of the commissioners who at the first election in each ward had the smallest number of votes; and the third who have to retire at the expiration of the second year after the first election are appointed to consist of the commissioners who had the next smallest number of votes at the first election, or,

¹ See the Act 13 and 14 Vict., c. 33, section 33.

² See No. 160 of these Observations.

when the burgh is divided into wards, of the commissioners who at the first election in each ward had the next smallest number of votes. And thereafter the third who have annually to go out of office must consist of the commissioners who have been longest in office.¹

Reference will afterwards be made to circumstances which disturb the ordinary rotation of commissioners, and determine the persons to be included in the third of the commissioners who fall to retire in each year.

26. In such burghs of this kind as have adopted the Police Act of 1850 or 1862, and resolved that the magistrates and council, or commissioners, or trustees, acting under the charter or local act by which each burgh has been erected, or under which its affairs are administered, shall be commissioners of police,² the proportion of the councillors, or commissioners, or trustees, who fall to retire from time to time, as fixed by the charter or act of parliament is not affected by the provisions of the Ballot Act.

¹ See the "General Police and Improvement (Scotland) Act, 1862," section 51.

² Being the burghs referred to in Nos. 6 and 7 of these Observations.

VI.—PERIOD AT WHICH MUNICIPAL ELECTIONS TAKE PLACE.

1. In Royal and Parliamentary Burghs.

27. In all Royal and Parliamentary Burghs, elections of town councillors take place on the first Tuesday of November in each year.¹

In consequence of the passing of the Reform Act of 1868, on 13th July in that year, and the large extension of the franchise which that act conferred, it became necessary to postpone the municipal elections in 1868 for a month. This was done by "The Municipal Elections Amendment (Scotland) Act, 1868," section 7 of which directed the municipal elections for that year to take place on the first Tuesday of December, and extended till that day the tenure of office of magistrates and councillors of every royal and parliamentary burgh, and of all trustees elected along with the councillors of such burghs. All subsequent elections were, however, appointed to take place on the first Tuesday of November.

2. In Burghs of Regality and Barony, not being Parliamentary Burghs.

28. There is no general rule in Burghs of Regality and Barony not being parliamentary burghs, as there is in royal and parliamentary burghs, in regard to the time at which elections of councillors take place. That is regulated in each burgh by the charter or act of Parliament by which the burgh has been erected, or under which its affairs are administered.

¹ See the Acts 3 and 4 Will. IV., c. 76, section 15; and 3 and 4 Will. IV., c. 77, section 11.

3. In Burghs and Places subject to the General Police Act of 1850 or 1862.

29. In all burghs and places which have adopted the General Police Act of 1850, or "The General Police and Improvement (Scotland) Act, 1862," in whole or in part, and in which commissioners fall to be elected, the election of commissioners to supply the place of the third which retires, takes place, as has been already stated, on the same day of the month in each year as that on which the first election of commissioners under the adopted act was made in these several places, or on the next lawful day thereafter.¹ It thus happens that such elections take place over the country at all periods of the year.

However desirable it may be that elections of commissioners of police throughout Scotland should take place at one fixed time, and that time the first Tuesday in November, when town councillors in royal and parliamentary burghs are elected, it cannot be held that this object has been accomplished by "The Ballot Act, 1872."

The enactment of sub-section (2) of section 22 of "The Ballot Act, 1872," that all municipal elections, including the election of commissioners of police under these acts, shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in schedule (C.) to the act 3 and 4 William IV., c. 76, are directed to be conducted by the acts in force at the time of the passing of the Ballot Act, as thereby amended, affects merely the manner of conducting the election, and not the time at which it is to take place. Schedule fifth of the Ballot Act no doubt repeals section 50 of the General Police Act of 1862, so far as it is inconsistent with the provisions of that act. But the election of commissioners of police may be conducted in the same manner in which the election of town councillors in the burghs specified in schedule (C.) must hereafter be conducted,

¹ See the Act 13 and 14 Vict., c. 33, section 33, and "The General Police and Improvement (Scotland) Act, 1862," section 50.

without any change being made in the time specified in section 50 of the act of 1862. Besides, it is important to observe that the Ballot Act contains no provision for extending the tenure of office of commissioners who may fall to retire before the first Tuesday of November. Nor does it declare that those commissioners whose tenure extends beyond that time, shall go out of office on that day.¹

30. In such burghs of this kind as have adopted the Police Act of 1850 or 1862, and resolved that the magistrates and council, or commissioners, or trustees, acting under the charter or local act, by which each burgh has been erected, or under which its affairs are administered, shall be commissioners of police,² the time at which municipal elections are appointed to take place by the charter or act of parliament is not affected by the Ballot Act.

¹ See Memorial and Opinion, Appendix XV., pp. [177]-[180], [187]-[188]. See also the opinions of Mr. A. R. Clark, quoted in the foot-note to No. 135 of these Observations.

Since these opinions were given, it has been decided by the First Division of the Court of Session, affirming the judgment of the Lord Ordinary (Gifford), that the Ballot Act does not affect the time at which elections of Police Commissioners are appointed to take place by the Police Acts of 1850 and 1862. *Hamilton v. The Police Commissioners of Dunoon*, 15th January 1875. *Session Cases* (fourth series), vol. ii. p. 299; *Scottish Law Reporter*, vol. xii. pp. 257-266.

² Being the burghs referred to in Nos. 6 and 7 of these Observations.

VII.—ELECTION OF TOWN COUNCILLORS AND COMMISSIONERS OF POLICE.

1. Of Councillors in Royal and Parliamentary Burghs.

31. Previous to the passing of "The Ballot Act, 1872," a different mode of procedure was prescribed in royal and parliamentary burghs which were not divided into wards, from that prescribed in burghs which were divided into wards.

In the former, the qualified electors were required, on the first Tuesday in November in each year, to assemble in the town hall, or other public room of the burgh, under the presidency of the provost or chief magistrate, and there and then to elect from among the persons who had been duly nominated for election, as afterwards explained, the required number of councillors, by means of lists containing the names of the persons for whom each elector voted. Each list was signed by the elector whose vote it recorded, and was openly delivered by him to the town clerk, who had to attend the meeting along with the provost or chief magistrate. The town clerk and provost or chief magistrate then publicly cast up the number of votes, and declared upon whom the election had fallen by the majority of votes.¹

In the latter, the qualified electors of each ward proceeded, on the first Tuesday in November in each year, at some place or places appointed for such ward, to elect the required number of councillors from among the persons who had been duly nominated, by open poll, taken in the presence of the provost or chief or senior magistrate of the burgh or of a legal substitute or substitutes appointed by him to preside at the polling place or polling places in each ward, and the town clerk or the person appointed by the provost or

¹ See the Act 3 and 4 William IV., c. 76, sections 11 and 15 ; and the Act 3 and 4 William IV., c. 77, sections 9 and 11.

chief or senior magistrate to officiate as poll clerk in the several wards. The poll clerk entered in a poll-book the vote of each elector for the candidate or candidates for whom he voted, and each page of the poll-book was subscribed by the person who presided at the polling place, and by the poll clerk, before any entry was made in the succeeding pages. At the close of the poll, the poll-books for the several wards were sealed up by the persons who presided at the several polling places, and were transmitted to the provost or chief or senior magistrate. On the next lawful day, between the hours of twelve and two o'clock, and within the town-house or other public building of the burgh, the provost or chief or senior magistrate openly broke the seals, and, with the assistance of the town clerk and such other persons as he thought fit to employ, cast up the votes given, and declared upon whom the election had fallen by the majority of votes,—making a double return in every case when the votes were equal.¹

The difference in the form of procedure applicable to burghs not divided into wards, and in that applicable to burghs which are divided into wards, is done away with, and the procedure in all municipal elections is assimilated by "The Ballot Act, 1872," section 22, subsection (2) of which enacts that all municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs, contained in schedule (C.) to the Act of 3 and 4 William IV., cap. 76, are directed to be conducted by the acts in force at the time of the passing of the Ballot Act as amended thereby. The royal burghs specified in schedule (C.) are those which were divided into wards or districts in 1833, and are enumerated in No. 16 of these Observations. In dealing with the procedure to be hereafter adopted in the conduct of municipal elections in all the burghs in Scotland, it is only necessary, therefore, to

¹ See the Act 3 and 4 William IV., c. 76, sections 8, 10, and, 15; and the Act 3 and 4 William IV., c. 77, sections 4, 8, and 11.

refer to the provisions of the several acts passed previous to the Ballot Act in so far as they apply to the royal burghs specified in that schedule.

(1.) *Arrangements preliminary to the Nomination of Candidates.*

32. In all royal burghs which were divided into wards, the Act 3 and 4 William IV., cap. 76,¹ laid upon the town clerk the duty of appointing the requisite number of polling places in each ward, and the requisite number of booths or divisions at each polling place. In parliamentary burghs, so divided, the provost or chief or senior magistrate was empowered by the Act 3 and 4 William IV., cap. 77,² to appoint such and as many polling places or booths as might be necessary. The Municipal Elections Amendment (Scotland) Act, 1868, provided, as regarded both royal and parliamentary burghs³ which were or might be divided into wards, that if it should appear to the town clerk that more than one polling place or compartment was required for municipal elections in any of the wards, he should provide such additional number as might be necessary. Section 20, subsection (3), and section 22, subsection (1), of the Ballot Act, however, requires the provost or chief magistrate, or other officer who, under the law relating to municipal elections, presides at such elections, to provide everything which in the case of a parliamentary election is required to be provided by the returning officer for the purpose of a poll, and section 8 directs the returning officer in parliamentary elections to provide such polling stations, etc., as may be necessary for effectually conducting the election. The duty of providing polling stations in municipal elections is thus devolved exclusively on the returning officer.⁴

¹ See section 9. ² See section 7. ³ See sections 16 and 17.

⁴ The question whether, under the Ballot Act, polling places have to be provided, and their situation publicly intimated, by the

In anticipation of the election of town councillors on the first Tuesday of November in each year, it is now the duty of the returning officer to arrange timeously as to the place or places at which the election is to take place.¹ In burghs which are not divided into wards, the town-house or other public room of the burgh is the proper place; but when this cannot be got another suitable place must be selected. In burghs which are divided into wards, a suitable place will have to be selected for each ward.² This should if possible be got within the ward; but there may be cases in which a hall or school in one ward is conveniently situated for the electors in the ward adjacent; and it is surely within the power of the returning officer to take advantage of it rather than to incur the expense of erecting a temporary booth. Or in the event of its being necessary to erect a polling booth for each of two adjacent wards, a space may be found, equally convenient for the electors in both wards, on which a booth may be erected, divided so as to serve as a polling place with suitable polling stations for each ward. These are matters in which it cannot be doubted a large discretion is vested in the returning officer, but the prudent course is to have the polling place for each ward within the ward, when that is practicable. No room can be taken compulsorily for a municipal election, as may be done in the case of a parliamentary election.³

33. The Act 15 and 16 Victoria, cap. 32, provides that

returning officer or by the town clerk, is considered in the Memorial submitted in 1872 to Mr. A. R. Clark, then Solicitor-General, and now Dean of Faculty, and to Mr Watson, now Solicitor-General [Appendix XV., pp. [163]-[166].] Their opinion, to the effect stated in the text, is given on page [184] of the same Appendix.

¹ See the Act 3 and 4 Will. IV., c. 76, sections 11 and 15; and the Act 3 and 4 Will. IV., c. 77, sections 9 and 11.

² See the Act 3 and 4 Will. IV., c. 76, sections 8 and 15; and the Act 3 and 4 Will. IV., c. 77, sections 4 and 11.

³ See section 6; and sub-section (7) (b) of section 20 of the Ballot Act.

when the provost and *all* the magistrates of any royal or parliamentary burgh are included in the third part of the council which goes out of office on the morning of the annual election, they nevertheless retain and continue to exercise all the powers and functions of the several offices of provost and magistrates respectively, until the election and coming into office of their successors; but after the period of their so going out of office, they are not entitled to act or vote as councillors. In such circumstances, therefore, the provost or chief magistrate acts as returning officer throughout the election, in the same way as if he did not go out of office as one of the retiring third of the council.¹ The enactment, it will be observed, refers only to the case of the provost and all the magistrates of a burgh being included in *the third part* of the council going out of office at the period of the annual election, but it has been held that the provision,—being intended to remedy the evils arising from the going out of office of all the magistrates of a burgh at an annual election,—applies also to the case of the provost and all the magistrates going out of office *as magistrates*, though they may not be included in the third of the council who retire.²

If all the magistrates are not included in the retiring

¹ See the Act 15 and 16 Victoria, cap. 32, sections 5 and 6.

² See *Ogilvie, &c. v. Guthrie, &c.*, 3d March 1865, 3 Macpherson, 589. In this case the retiring provost of the burgh of Brechin presided at the annual election of councillors in November 1864, under the following circumstances. He had been elected *ad interim* as councillor and provost. The junior bailie had also been elected *ad interim* as councillor and bailie. Both, therefore, fell to retire from the council at the next annual election, and the councillors in whose room they had been elected would, if they had remained in office, have had to retire at that time by rotation. The senior bailie had also been elected to that office *ad interim*, and consequently ceased to be a magistrate, in the ordinary course, at the next annual election, though he still remained a councillor. An action to have the election set aside was thereupon brought, on the ground that the provost had no right to preside, and it was contended—(1) that none of the magistrates was “included in the third of the council going out of office;” (2) that as the senior bailie did not cease to be a councillor, the three magistrates were not all included in that third; and (3) that in either case the clause of the Act did not apply. The Lord Ordinary (Barcaple) held, (1) that the provost and junior bailie having been elected *ad interim* in room of

third, then the senior magistrate in office, on the retirement of the provost or chief magistrate, becomes the returning officer, and presides at the election.¹

When a royal burgh is without a legal council, and under the administration of managers appointed by the Court of Session, the sheriff of the county in which the burgh is situated is required, on application by any qualified elector of the burgh, to appoint one of the managers to discharge the duties and exercise the powers of returning officer.²

In any parliamentary burgh in which there is no provost or chief or senior or other magistrate, the sheriff of the county in which the burgh is situated, or one of his ordinary substitutes, presides and acts with reference to municipal elections, as such provost or chief or other magistrate is directed by 3 and 4 Will. IV., cap. 77, to preside and act.³

councillors who, had they remained in office till the annual election in 1864, would then have fallen to retire by rotation, were properly included in the third of the council who went out of office at that time; (2) that the senior bailie was in no sense included in the third of the council going out of office; and (3) that the provision of the Act 15 and 16 Vict., cap. 32, was applicable—two of the magistrates being included in the retiring third of the council, and the third having gone out of office merely in consequence of the *interim* nature of his appointment, in circumstances to which that Act does not at all refer, and in which therefore he could not have retained his functions, although all the other magistrates had been in the same position. The First Division of the Court affirmed the Lord Ordinary's interlocutor, on the broad ground that the evil intended to be remedied was the cessation of the power of the magistrates before their successors were appointed, and that the object of the statute was, that the magistrates going out of office at the annual election should retain and exercise their powers as magistrates till their successors came into office.

¹ See the Acts 3 and 4 Will. IV., cap. 76, sections 8, 10, and 15; 3 and 4 Will. IV., cap. 77, sections 4, 9, and 11; and 15 and 16 Victoria, cap. 32, section 6.

² See the Act 3 and 4 Will. IV., cap. 76, section 27, as amended by the Acts 15 and 16 Victoria, cap. 32, section 7, and 31 and 32 Victoria, cap. 108, section 13.

See Observations as to the election of councillors and magistrates of royal burghs which are without legal councils and under the administration of managers.

See also *Whyte v. Scott and Others*, 7th March 1854, 16 D, p. 798.

³ 3 and 4 Will. IV., cap. 77, section 5. But see section 25 of the same act, which provides that when any parliamentary burgh is without a legal council or magistracy, all the functions directed by the Act to be

The question has not been raised in Scotland, so far as the writer is aware, whether a provost or senior magistrate, who is himself a candidate for re-election as a councillor, is entitled to act as returning officer under the provisions of sections 5 and 6 of the Act 15 and 16 Vict., cap. 32. In England, it is provided by the Act 5 and 6 Will. IV., cap. 76, sect. 36, that if the mayor of a burgh shall, at the time when it may be necessary to exercise the powers and duties provided by that Act with respect to elections, be dead, absent, "or otherwise incapable of acting," the town council shall elect one of the aldermen to execute such powers and duties in the place of the mayor, and the Court of Queen's Bench has held that the candidature of a mayor renders him "incapable of acting" as returning officer.¹

performed by the existing magistrates or councils shall be performed by one or more of the managers who may, by any lawful appointment, be then in the actual administration of the affairs of any such burgh; and in default of any such managers, by the sheriff or sheriff-substitute of the county. This provision does not seem to be affected by section 7 of the Act 15 and 16 Victoria, cap. 32, or section 13 of the Act 31 and 32 Victoria, cap. 108. See also *Whyte v. Scott*, *ut supra*.

¹ *The Queen v. Owens*, 11th June 1859, L. J. (N. S., Q. B.) xxviii. p. 316. *The Queen v. Blizard*, 24th November 1866, L. R. (Q. B.) ii. p. 55. *The Queen v. White*, 27th June 1867, L. R. (Q. B.) ii. p. 557; and *the Queen v. The Mayor of Tewkesbury, &c.*, 13th June 1868, L. R. (Q. B.) iii. p. 629.

In delivering judgment in the case of *the Queen v. Owens*, Lord Campbell, C.J., said: "Upon the maxim that no man shall be judge in his own cause, I am of opinion that a returning officer cannot be allowed, in the election at which he presides, to return himself. This is not a mere peculiarity of election law, according to which the sheriff of the county cannot return himself member of Parliament for his own county. It is said that the duty of the mayor is ministerial. But he has to determine questions arising on the voting-papers, and whether those who voted have given their votes in due form, according to the requirements of the statute; and he has to decide difficult and perplexing questions, which are sometimes brought before us. He has the opportunity of acting partially, and of perverting the rights of others. Therefore the maxim applies to the mayor. It was clear to my mind from the beginning that this was a void election, unless there was something in the Municipal Corporations Reform Act which enabled that to be done which otherwise could not be done. Section 28, when properly examined, does not bear the construction which has been put upon it; it merely enacts that the mayor may be eligible, but not that he is to be returned by himself; and section 36 enables the council to provide a substitute if the mayor is 'otherwise incapable of acting,' and meets

34. Having arranged as to the place at which the election for each ward is to proceed in the event of a contest, the returning officer must give the requisite information to the town clerk, who is required, ten days at least previous to the day of election, to give public intimation, by notice affixed to the church doors of the several parishes of the burgh, of the place or places so selected. In making that statutory intimation it is convenient to state what vacancies have to be supplied in each ward, and to remind the electors of the manner in which the requisite nominations must be made.¹ The vacancies to be so supplied will be those occasioned by the retirement of the third of the council,² and by the death, disability, or resignation of any councillors during the year, whether the places of the councillors who have so died, become disabled, or resigned, have been supplied *ad interim* or not.³

(2.) *Nomination of Candidates, and Publication of their Names.*

35. The next step towards the election of town councillors in all royal and parliamentary burghs is the

this case, because the mayor, being a candidate, is incapable of acting. The mayor is not eligible if he is proposed as a candidate whilst the election is going on, for then he is acting, and must act, as returning officer, and, being so, he cannot be a candidate, any more than a sheriff can be proposed to represent his own county in Parliament. If votes were tendered for him he would say, 'I am ineligible, and I cannot receive your votes.' The whole statute harmonises with this construction; and it would be liable to great abuse if we should hold that the mayor could be judge in his own cause." Justices Wightman, Erle, and Crompton adopted the same views.

¹ See form of notice, Appendix XVI., No. 1, pp. [191], [192].

² 3 and 4 Will. IV., c. 76, sections 8, 9, 15, and 29; 3 and 4 Will. IV., c. 77, sections 4, 7, 9, 11, and 27. "The Municipal Elections Amendment (Scotland) Act, 1868," section 16. "The Ballot Act, 1872," sections 8 and 20, sub-section (3).

In Edinburgh, it is sufficient that the notice be affixed to or near the door of the church of St. Giles, and that it be also inserted at least once in one of the Edinburgh newspapers. See section 16 of "The Edinburgh Municipality Extension Act, 1856."

³ See No. 23 of these Observations.

⁴ See Nos. 43, 169, 171, 180 of these Observations.

nomination of candidates; and here the question arises, Must such nomination continue to be made in conformity with the provisions of "The Municipal Elections Amendment (Scotland) Act, 1868," or must it be made in the way and manner prescribed by the Ballot Act? This question was fully discussed in the memorial submitted in October 1872 to Mr. A. R. Clark, then Solicitor-General, now Dean of Faculty, and Mr. Watson, now Solicitor-General, and their opinion was that the provisions of the Ballot Act do not apply to the nomination of candidates at municipal elections.¹ A similar opinion was obtained by the town clerk of Glasgow, in August 1872, from the then Lord Advocate (now Lord Young).² These opinions have, it is believed, been universally acted upon.

¹ See Memorial and Opinion, Appendix XV., pp. [159-162] and [183].

² The Lord Advocate's opinion was as follows:—"I am of opinion that the note [to the form of nomination paper in the Ballot Act], which refers only to 'the form of the nomination,' has not the effect of making applicable to burgh elections the provision of the Act regarding the assent and subscription of eight electors."

See also observations by Lord Gifford and the Lord President in the case of *Hamilton v. The Police Commissioners of Dunoon*, 15th January 1875; Session Cases (fourth series), vol. ii. pp. 303, 309, and 310.

The question has still more recently been considered and decided by the Court of Common Pleas, in England, with reference to the Barnstaple municipal election, in *Northcote v. Pulsford*, 8th May 1875. In that case, Mr. Justice Brett, who delivered the judgment of the Court, made the following observations:—"Now is to be considered whether all, or if only a part, how much, of the procedure at a municipal election is altered by the Ballot Act. That statute is divided into Parts. Part 1 is intituled 'Parliamentary Elections,' and is divided into sections from 1 to 19 inclusive. Then follows Part 2, intituled 'Municipal Elections.' These elections have not been mentioned in Part 1. By section 20, which is the first which deals with municipal elections, 'the *poll at every contested* municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act and of the said schedules as *relate to or are*

Previous to the passing of "The Municipal Elections Amendment (Scotland) Act, 1868," the election of councillors in burghs which were not divided into wards took place, as has been already explained, at the public meeting on the first Tuesday of November at which the candidates were proposed; and at that meeting the claims of any elector might be submitted to the constituency for the first time. In burghs which were divided into wards it was competent to nominate and vote for any elector until the poll was closed. No previous nomination was necessary. Ward meetings were usually held some time before the day of election, and at these meetings, as a rule, the several candidates were proposed; but these meetings were not in any way recognised by law, and nomination there was not in any degree a pre-requisite to election. The result was that, occasionally, attempts were made to carry an election by surprise. When only such a number of candidates was proposed for

concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election'; and 'a municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed.' In the first part of the section it is not a municipal election which is mentioned, nor even a contested municipal election, but *the poll at a contested municipal election*; and it is not a parliamentary election to which it is assimilated, but *the poll at a contested parliamentary election*; and, in the second part, a municipal election shall be conducted in the same manner as before, '*except in so far as relates to the taking of the poll in the event of its being contested.*' If there is no contest, the whole municipal election is to be conducted as before; and, considering the plain division made in the Act, as before pointed out, between the other parts of an election and the poll or the taking of the poll, it cannot, upon consideration, be held that the provisions as to the nomination are within the meaning of this section, such provisions 'as relate to or are concerned with' the poll. The nomination, therefore, and all proceedings with regard to it, are to be conducted as before, *i. e.*, according to the statutes 5 and 6 William IV., c. 76, (the English Municipal Corporations Act), and 22 Vict., c. 35, (the English Municipal Election Act), except in this, that, according to the note at the end of the form of

election as there were vacancies to be supplied, the poll was regarded as little more than an idle ceremony, and few electors took the trouble to record their votes. A town councillor, with a constituency numbering many hundreds, might thus, and frequently did, find himself elected by six or eight votes. Nothing could be easier, in such circumstances, than for a very few persons to wait till within half an hour of the close of the poll, and then to fill the polling booth, nominate and elect a candidate who had never previously been heard of, and so reject the candidate whose election was till the last moment regarded as unopposed. To remedy this state of matters, "The Municipal Elections Amendment (Scotland) Act, 1868," prescribed nomination of candidates according to a statutory form, and enacted that it shall not be competent to elect any person to the office of town councillor in any royal or parliamentary burgh in Scotland whose name is not intimated to the town clerk "on or before four of the clock,

the nomination-paper in Schedule 2, 'the *form* of nomination-paper in a municipal election shall, as nearly as circumstances will admit, be the same as in the case of a parliamentary election.' Considering the construction of section 20, and its affirmative and negative restriction of the effect of the Ballot Act in municipal elections to the conduct of the taking of the poll alone, this note is, in our opinion, not sufficient to authorise any alteration in the substantial requisites under the former statutes of a nomination at a municipal election. We are, therefore, of opinion that the mode of conducting the nomination at a municipal election, whether contested or uncontested, is still regulated by the municipal election statutes, and that no defect in a nomination which would be fatal under those statutes can be cured by rules 12 or 13 of the Ballot Act. As the nomination is not to be made 'in the manner provided by the Ballot Act,' those rules are by their terms prevented from being applicable. And section 13 is also inapplicable to any defect but one in a nomination at a municipal election, because such defect, unless it be in the mere form of the nomination-paper, is not a non-compliance with the rules contained in the first schedule or a mistake in the use of the forms in the second schedule to the Ballot Act." [L. R. (C. P.), vol. x. pp. 482, 483.]

"The Municipal Elections Act, 1875," (38 & 39 Vict. cap. 40) now regulates the mode of nominating candidates in municipal

afternoon, on the Thursday immediately preceding the day of election.”¹ In connection with this provision of the act, it has been argued that the nomination of candidates must be made on the Thursday preceding the day of election, and that a nomination lodged with the town

elections in England. Section 1 provides *inter alia* that at all municipal elections of councillors, auditors, and assessors, after the passing of the Act (19th July 1875), every candidate must be nominated in writing, and the writing must be subscribed by two enrolled burgesses of the borough or ward for which the election is to be held, as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. Every person nominated must be enrolled on the burgess roll of the borough; or be a person whose name is inserted in the separate list at the end of the burgess roll, as provided by section 3 of the Act 32 & 33 Vict. cap. 55, and must be otherwise qualified to be elected. The nomination paper must state the particulars prescribed by the Act, and be in the form of the schedule appended thereto, or to the like effect. Every nomination paper must be delivered by the candidate himself, or his proposer or seconder, to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered. The town clerk must forthwith send notice of such nomination to each person nominated, and on the day next after the last day for the delivery of nominations to the town clerk, the mayor must attend at the town-hall, between the hours of two and four in the afternoon, and decide on the validity of every objection made, in writing, to a nomination paper. The candidate nominated by each nomination paper, and one other person appointed by or on behalf of the candidate as directed by the Act, and no other person, shall, except for the purpose of assisting the mayor, be entitled to attend such proceedings; and each candidate and the person appointed by him may, during the time appointed for the attendance of the mayor for the purpose aforesaid, object to the nomination paper of every person nominated at the same election. The decision of the mayor, which must be given in writing, if disallowing any objection to a nomination paper, is final; but if allowing the same, is subject to reversal on petition questioning the election or return. The nomination of a person who is absent from the United Kingdom is declared by section 3 to be void, unless his written consent, given within one month of the day of his nomination before two witnesses, be produced at the time of his nomination.

¹ See section 9 and Schedule (B.) of the Act.

clerk, say on the immediately preceding Tuesday or Wednesday, would be invalid. Electors will, of course, do well, in nominating candidates, to see that the nomination paper is lodged on the Thursday; but the writer would not, as at present advised, reject on that ground a nomination paper lodged with him on the Tuesday or Wednesday preceding the day of election. The undoubted object of the enactment was to secure that the electors should be timely informed of the names of those candidates who were offered for their suffrages, and to prevent surprises; and it is impossible to see how these objects could be prejudiced by the lodgment of a nomination paper two or three days earlier than the day specified in the statute. Besides, it is surely an excessively strict, and scarcely a reasonable construction of the section, to hold that a nomination on the Tuesday or Wednesday is not a nomination *before* four of the clock afternoon *on* the Thursday. The four o'clock on the Thursday seems to be intended merely to fix the latest hour at which nominations can be made, and not to limit them to that day.

36. The returning officer in municipal elections is under no obligation, as the returning officer in parliamentary elections is,¹ to supply forms of nomination papers to such registered electors as may apply for them; but it is expedient that he should do so in order to secure accuracy and uniformity as far as possible. Even in parliamentary elections other papers than those supplied by the returning officer may be used, provided they are in the form prescribed by the Ballot Act.² In municipal elections the requirement of the Act of 1868 is that the intimation of the names of the persons proposed for election shall be in the form of the schedule B thereto annexed, "or as near thereto as circumstances admit."

Every candidate should be nominated by a separate

¹ See section 8 and rule 7 of schedule First of the Ballot Act.

² Ibid. Note to schedule Second and section 13 of the Ballot Act.

nomination paper. The nomination must be made in writing, according to schedule (B.) of the act, by two registered electors, whose names and places of abode must be given, as in the municipal register of the burgh. The person proposed must be similarly designed. The register contains the "occupation," as well as the "place of abode," of the electors; and it is desirable that the former should also be given, for though not required by the Municipal Elections Amendment (Scotland) Act, 1868, its insertion will enable the ballot paper to be prepared in entire accordance with the provisions of the Ballot Act.¹ If the burgh is divided into wards, the ward for which the candidate is proposed must be stated.²

37. As the statutory form of nomination requires the proposers to insert the names and places of abode as in the municipal register of the burgh, it has sometimes been held that any two registered electors in the burgh may nominate a person for election in a particular ward in which they themselves had no title to vote; and thus the anomaly has occurred in the case of an uncontested election in a ward, that the councillor was elected on the nomination of two persons who, if a contest had taken place, could not have recorded their votes in favour of their own nominee. This, however, is a practice which should be everywhere discontinued. In 1872 Mr A. R. Clark, then Solicitor-General, now Dean of Faculty, and Mr Watson, now Solicitor-General, gave it as their opinion that, under the Municipal Elections Amendment (Scotland) Act, 1868, the proposer and seconder of a candidate must be electors, qualified to vote in the ward for which the candidate is nominated.³

38. The Ballot Act, 1872, requires that candidates

¹ See No. 46, sub-division (4), of these Observations.

² See form, No. 3, Appendix XVI., p. [194].

³ See Memorial and Opinion, Appendix XV., p. [183]. "The Municipal Elections Amendment (Scotland) Act, 1868," section 9. By the 6th section of 22 Vict., cap. 35, it is enacted, that "at

for election to serve in Parliament for a county or borough shall also be nominated in writing; and it directs by section 1 that the writing shall be subscribed by two registered electors of such county or borough, as proposer and seconder, and by eight other registered electors of the same county or borough, as assenting to the nomination. Rule 5 of schedule First of the Act directs that each candidate shall be nominated by a separate nomination paper, but that the same electors, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more. Rule 6 regulates the manner in which the candidate is to be described; and rule 7 requires every nomination paper to be in the form prescribed by the Ballot Act. All nomination papers in parliamentary elections must be delivered to the returning officer, who is required by rule 9 to give public notice of the day on which the poll will be taken, and of the candidates, described as in the respective nomination papers, and of the names of the persons who subscribe the nomination papers of each candidate. There is thus a considerable difference between the nominations prescribed by the Ballot Act and those prescribed by the Municipal Elections Amendment (Scotland) Act, 1868. The former, moreover, must be lodged with and publicly intimated

any election of councillors to be held for any borough or ward (in England), any person *entitled to vote* may nominate for the office of councillor himself (if duly qualified), or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward), and every such nomination shall be in writing," &c. Under this section it has been held, in the *Queen v. Parkinson*, 9th November 1867 [L. R. iii. p 11], that the person nominating a candidate for town councillor must be entitled to vote for the particular ward for which he nominates; and if he be entitled to vote only for another ward, his nomination and the election of the candidate are void. In that case Mr. Justice Lush observed,—“By section 8, if the number of candidates is not greater than the vacancies, the persons nominated are to be elected without a poll, so that, in effect, the person nominating the candidate votes for him.

by the returning officer, while the latter must be lodged with and publicly intimated by the town clerk.¹

39. The Ballot Act confers upon returning officers in parliamentary elections large discretionary powers in dealing with the nomination papers lodged with them. Rule 6 of schedule First provides that each candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate. No objection to a nomination paper on the ground of the description therein being insufficient, or not being in compliance with the rule, shall, it is further provided, be allowed or deemed valid, unless such objection is made by the returning officer, or by some other person, at or immediately after the time of the delivery of the nomination paper. Further, it is declared, by Rule 12, that every person whose nomination paper has been delivered to the returning officer during the time appointed for the election, shall be deemed to have been nominated in manner provided by the Ballot Act, unless objection be made to his nomination paper by the returning officer or some other person before the expiration of the time appointed for the election, or within one hour afterwards. And again, Rule 13 empowers the returning officer to decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, is declared to be final; but if allowing it, shall be subject to reversal on petition questioning the election or return. The question has been raised whether the town clerk, with whom nomination papers in municipal elections must be lodged, may not exercise a similar discretion in regard to them? If, as seems to be sufficiently clear, the provisions of the Ballot Act in regard to nominations do not apply to municipal elections, the town clerk is not entitled to exercise

¹ See Memorial and Opinion, Appendix XV., pp. [159] [162], and [183].

See also the footnote to No. 35 of these Observations.

the discretion which the Ballot Act gives to returning officers in the matter. The enactments of "The Municipal Elections Amendment (Scotland) Act, 1868," must, however, be observed by him. They require nominations to be made according to a prescribed form, "or as near thereto as circumstances admit," and the public intimation to be given by him must also be according to a prescribed form, or as near thereto as circumstances admit." This implies the exercise by the town clerk of a certain discretionary power; and while electors should adhere strictly to the directions of the statute, and so avoid question, and possibly much trouble and expense, the writer has been advised by eminent counsel, in cases that have arisen in his own experience, that he is not only entitled to exercise, but should exercise, reasonable toleration of immaterial departures from the strict letter of the law, and give effect to nominations which sufficiently identify the candidates proposed, and their proposers or seconders. If, however, the departure from the requirements of the statute, as regards any nomination, are material, it is the duty of the town clerk to disregard the objectionable nomination, and to act as if it had not been lodged.

A more difficult question remains in regard to the course to be followed in the event of a registered elector being nominated who is not eligible as a councillor under the Acts 3 and 4 Will. IV., caps. 76 and 77. These acts, as has been seen,¹ limit the election of councillors of royal and parliamentary burghs respectively to registered electors who reside or personally carry on business within certain limits therein prescribed, and "The Municipal Elections Amendment (Scotland) Act, 1868," does not remove or interfere with that limitation. It merely prescribes intimation to the town clerk previous to a certain time, and in a particular form, of the names of all persons proposed for election, and that form, it is

¹ See No. 19 of these Observations.

obvious, may be strictly observed when the person nominated is not eligible for election. In such circumstances is it the duty of the town clerk—when possibly no reasonable doubt can exist as to the ineligibility of the person proposed—to give the public intimation required by the statute, and so to put the burgh to all the cost and inconvenience it may be of a futile contest and subsequent litigation? The Act of 1868 confers no express power upon him to judge of the eligibility of persons proposed for election, and to reject the nomination of those who, being registered electors, are otherwise disqualified. It must be presumed, however, that the nominations prescribed by the act are those of electors possessing the statutory qualifications, and that the requirement on the town clerk to cause public notice¹ to be given “of the names of all persons so intimated to him,” applies only to the names of persons who are *ex facie* regularly intimated, and who are also eligible for election. Assuming this view to be correct, the duty of discriminating between valid and invalid nominations is a delicate and responsible one, but, as at present advised, the writer would not give effect to a nomination of a person as to whose ineligibility he had no doubt.² If, however, he had doubts on the subject, he would proceed with the public intimation, leaving the legality of the election to be afterwards questioned and judicially determined.

40. The Ballot Act provides, as regards parliamentary elections, that within a limited time after the returning officer receives the writ, he must give public notice, *inter*

¹ See section 9 of “The Municipal Elections Amendment (Scotland) Act, 1868.”

² See the opinions of Mr. A. R. Clark, Dean of Faculty, and Mr. J. B. Balfour, Advocate, in regard to the burgh of Lerwick, quoted in the footnote to No. 135 of these Observations.

See also the judgment of the Court of Common Pleas, in England, in the case of *Northcote v. Pulsford*, 8th May 1875, L. R. (C. P.), vol. x. p. 483, referred to in the footnote to No. 43 of these Observations.

alia, of the day on which, and the place at which, he will proceed to an election, and of the time appointed for the election, and the day on which the poll will be taken in case the election is contested.¹ It further provides that the time appointed for the election shall be such two hours between the hours of ten in the forenoon and three in the afternoon as may be appointed by the returning officer, and the returning officer must attend during these two hours and for one hour after.² It also requires the nomination paper to be delivered by the candidate himself, or by his proposer or seconder, to the returning officer at the place of election during the time appointed for the election.³ The time of election is thus the two hours within which nomination papers may be lodged with the returning officer. The Ballot Act, moreover, enacts that if, at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected; but that if, at the expiration of such hour, more candidates stand nominated than there are vacancies to be filled up, the returning officer shall adjourn the election, and shall take a poll in the manner directed by the Act.⁴ It then declares that a candidate may, during the time appointed for the election, but not afterwards, withdraw from his candidature by giving a notice to that effect, signed by him, to the returning officer; and it provides that the proposer of a candidate nominated in his absence out of the United Kingdom may withdraw such candidate by a written notice signed by him and delivered to the returning officer, together with a written declaration of

¹ See rule 1 of schedule First of "The Ballot Act, 1872."

² See rule 4 of schedule First of "The Ballot Act, 1872."

³ See rule 8 of schedule First, and Section 1 of "The Ballot Act, 1872."

⁴ See Section 1 of "The Ballot Act, 1872."

such absence of the candidate.¹ If a candidate nominated during the time appointed for the election is withdrawn, in pursuance of the above provisions, the returning officer must give public notice of the name of such candidate, and the names of the persons who subscribed his nomination paper, as well as of the candidates who stood nominated or were elected.² Thus, then, even in Parliamentary elections, it is only during the two hours appointed for the election that a candidate may withdraw, or that the proposer of a candidate, nominated in his absence out of the United Kingdom, may withdraw such candidate. After the expiration of the time appointed for the election, no withdrawal can take place, either by a candidate, or by the proposer of an absent candidate, and a poll must proceed. There is no corresponding provision in any of the acts relating to municipal elections, and it seems clear that after four o'clock on the Thursday preceding the election, no candidate who has been proposed can be withdrawn. A poll must take place, and if the candidate who wishes to withdraw be nevertheless elected, he may decline to accept office, in which event a new election will be ordered, and the electors in the burgh or ward will be afforded an opportunity of nominating another candidate to take his place. Or if, after being elected, he desires to save the community the cost of a second election, and to avoid the attendant delay, he may accept office, be inducted, and immediately resign, when, after the statutory interval and notice to be afterwards described, the town council will appoint a councillor *ad interim*.³

¹ See Section 1 of "The Ballot Act, 1872."

² See rule 10 of schedule First of "The Ballot Act, 1872."

³ See section 10 of the Act 3 and 4 Will. IV., c. 76.

See section 25 of the Act 3 and 4 Will. IV., c. 76, and section 23 of the Act 3 and 4 Will. IV., c. 77.

The Municipal Elections Act, 1875 (38 and 39 Vict., cap. 40), section 7, provides for the withdrawal of nominations in municipal

41. Whether, after a candidate has been nominated, his nomination can be withdrawn by him, or by his proposer and seconder, or by them all acting in concert, before four o'clock on the Thursday immediately preceding the day of election, is a question of greater difficulty. The acts relating to municipal elections contain no provision on the subject, any more than for the case of a candidate dying between the date of his nomination and the time of taking the poll. As the writer is at present advised, he would not allow such withdrawal, and for this reason:—The nomination of a candidate is a matter in which all the electors in the burgh or ward for which he has been nominated may be deeply interested. Each of two candidates for any vacancy may be the representative of a large body of electors holding strong views on a particular question, and at the poll each party may reasonably hope to secure, or, at all events, has a right to attempt to secure, the election of its representative. The nomination of a candidate holding the particular views of each party is the first step towards a contest; and if any one of the candidates who has been nominated is elected, and declines to accept office, his declinature no doubt occasions the delay and entails the expense consequent upon a new election, but it does not deprive the persons who elected him of the opportunity of securing another representative. The withdrawal of the nomination of their candidate, however, possibly without their knowledge or at a time

elections in England as follows :—“ Where more candidates are nominated at any municipal election than there are vacancies to be filled at such election, any of such candidates may withdraw from his candidature by notice signed by him and delivered to the town clerk not later than two o'clock in the afternoon of the day next after the last day for the delivery of nomination papers to the town clerk; provided that such notices shall take effect in the order in which they are delivered to the town clerk, and that no such notice shall have effect so as to reduce the number of candidates ultimately standing nominated below the number of the vacancies to be filled.”

when it is impossible for them to substitute another, might secure the unopposed return of the other candidate, however unpopular he might be. The risk of such a result is what the writer would not be prepared to undertake on his own responsibility.

42. On receiving the several nominations, the town-clerk must, on or before the Friday immediately preceding the day of election, cause public notice to be given, in the form prescribed by schedule (C) of "The Municipal Elections Amendment (Scotland) Act, 1868," of the names of all persons so intimated to him. The intimation must set forth the name and place of abode of the candidate, and the names and places of abode of the proposer and seconder, as in the nomination paper. When a burgh is divided into wards, the schedule directs that the names and designations of the candidates for each ward shall be separately distinguished. This statutory notice must be affixed to the doors of the town hall or council chambers, and of the parish churches in the burgh; and if the town clerk thinks expedient, the notice may be advertised in one or more newspapers published or circulating within the burgh.¹

43. If the number of persons whose names are intimated to the town clerk as persons proposed for election in any burgh, or in any ward of any burgh which is divided into wards, does not exceed the number of vacancies to be supplied in such burgh or ward, no poll or voting will take place.²

¹ See "The Municipal Elections Amendment (Scotland) Act, 1868," section 9.

See No. 39 of these Observations.

² In the case of *Northcote v. Pulsford*, decided by the Court of Common Pleas in England on 8th May 1875, a candidate at the Barnstaple Municipal Election of 1874 having been twice nominated, —one nomination being good and the other being bad,—the Court held (1) that if the bad nomination had been the only one, the candidature of the nominee ought to have been

These vacancies will be not only those intimated by the town clerk as previously recommended, but also such other vacancies as may have been occasioned by the death or disability of councillors between the date of that intimation and four o'clock on the Thursday preceding the election. For although such additional vacancy had not occurred when the intimation of the polling places was made, and consequently could not be referred to in that intimation, the notification, ten days previous to the election, of the vacancies to be supplied is not statutory; and it appears to the writer to be within the power of any two electors in the burgh or ward to nominate candidates for election to supply any vacancies actually existing at the latest moment for lodging nominations.¹

In the statutory intimation of the names of the candidates nominated, the town clerk notifies that, in respect the number of persons proposed for election does not exceed the number of vacancies to be supplied in the burgh or ward, there will be no poll; and that the persons so proposed will be duly declared to be elected councillors of the burgh. This notification may be made by an addition to the statutory notice referred to in the preceding Observation, in the terms set forth in the schedule annexed to "The Municipal Elections Amendment (Scotland) Act, 1870," or in similar terms. Thereafter, on the day appointed for declaring the election of councillors, the persons so proposed will be declared to be duly elected, in the same manner as if they had been elected by a majority of votes in the case of a contested election.²

rejected; but (2) that the good nomination was not affected by the bad one, and that if there had been only one vacancy, and the nominee had been the only person proposed, he must have been at once declared duly elected upon the good nomination. [L. R. (C. P.), vol. x. pp. 476 486.]

¹ See Nos. 34, 169, 171, and 180 of these Observations.

² See "The Municipal Elections Amendment (Scotland) Act, 1870," section 3.

(3.) *Arrangements for conducting Contested Elections.*

44. With the publication of the statutory notices above referred to, the statutory duties of the town clerk in regard to all contested municipal elections terminate, till the counting of the votes has been completed and the several papers and documents connected with the election are handed over to him as the custodier of the records of the burgh. The charge of the whole arrangements connected with the subsequent stages of the election devolves upon the returning officer, who is required by the Ballot Act to "provide such nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of register of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in manner provided by the act." In the performance of this duty, the returning officer must necessarily incur considerable expense, for the payment of which he would seem to be personally responsible. But all expenses properly incurred are appointed to be defrayed "in manner provided by law with respect to the expenses of a municipal election."¹

It may be noticed that the Ballot Act imposes upon "the mayor,"—a term which in Scotland is declared to mean the provost or other chief magistrate of a burgh, as defined by the act,—the duty, as regards municipal elections, of providing everything which, in the case of a parliamentary election, is required to be provided by the returning officer for the purpose of a poll.² It can scarcely be doubted, that in cases in

¹ See "The Ballot Act, 1872," sections 8, 16, sub-section (5), and 20, sub-section (4).

See Observations as to the manner in which the expenses of municipal elections are paid.

² See "The Ballot Act, 1872," section 20, sub-section (3), and section 22, sub-section (1).

which the returning officer may not be the provost or chief magistrate of the burgh, he will be entitled to provide whatever is necessary for the proper conduct of the election.

45. If absence, indisposition, or other cause prevents the provost or chief magistrate from acting as returning officer, the magistrate next in order to him must undertake the duty. In such a case the appointments of presiding officers, clerks, and assistants, and the minutes of the several proceedings, should bear that the provost or chief magistrate is unable to act, for the reason which should be specified, and that in consequence the magistrate next in order, as acting chief magistrate, performs the duties of returning officer. When the provost or senior magistrate of a royal burgh is one of the retiring third of the council, and the other magistrates are unable to act, it appears to the writer that the provost or senior magistrate should act as returning officer on the principle recognised in the case of *Ogilvie v. Guthrie*.¹

46. In sketching the duties to which, in anticipation of a contested election, the returning officer must attend, it will be convenient to deal with the case of a burgh divided into wards. In such burghs the greatest amount of work has necessarily to be done, and it will be easy to apply the following suggestions to burghs not so divided. It will of course be understood that, as the certainty of a contest cannot be ascertained till after four o'clock on the Thursday immediately preceding the Tuesday on which the election takes place, the utmost time available for making many of the statutory arrangements is that between four o'clock on the afternoon of Thursday and eight o'clock on the morning of Tuesday. The returning officer will therefore lose no time in ascertaining from the town clerk in what wards there are to be contests; in

¹ See Nos. 32 and 33 of these Observations.

determining how far he can personally perform the work which the Ballot Act imposes upon him; and in securing the services of some person to direct the detailed arrangements which must be entrusted to others. The returning officer should then take the declaration of secrecy before a Justice of the Peace, and thereafter cause the declaration to be taken before himself by the person who is to act as his agent.¹ No other declaration and no oath need be taken by the returning officer or his agent. In every case, before the declaration is taken, section 4 of the Ballot Act must be read over to the declarant.

The following arrangements, in so far as not previously made, must thereafter be immediately attended to.

(1.) Ballot boxes must be provided. These boxes must be so constructed that the ballot papers can be introduced, but cannot be withdrawn, without the box being unlocked. They must be of such size as not to be choked by the ballot papers, and sufficiently strong to be carried about with safety,² and must otherwise fulfil the conditions required by the Ballot Act.³ Each presiding officer must be furnished with one box.

(2.) Instruments, with which to mark each side of every ballot paper with an official mark before delivering it to the elector, must be got. This mark may be either stamped or perforated. It must be kept secret, and an

¹ See rule 54 of schedule First of the Ballot Act.

² Home Office and Lord Advocate's abstract of the provisions of the Ballot Act, art. 22.

³ It is unnecessary to describe these in detail. A convenient form of box is patented by Messrs Knight & Company, of London, and supplied by Messrs Waterston & Son, of Edinburgh. Each box is capable of containing the ballot papers of more electors than any one presiding officer is ever likely to have assigned to him. It is provided with a canvas envelope, within which, after the close of the poll, it is placed and sealed up by the presiding officer before being delivered to the returning officer.

See section 2 and rule 23 of schedule First of the Ballot Act.

interval of not less than seven years must intervene between the use of the same official mark at elections for the same burgh. Returning officers will exercise their own judgment in the selection of such instruments as they conceive best adapted for the purpose.¹ Every presiding officer must be provided with one, and one or more extra instruments should be given to the officer presiding at the No. 1 polling station of each polling place, to be used in case of any of the other instruments becoming unworkable.

(3.) When a hall or other suitable building has been secured as a polling place, it should be subdivided into the required number of polling stations for the accommodation of the electors entitled to vote at such polling place; and the returning officer may distribute the stations among these electors as he thinks most convenient. Each polling station should be partitioned off from the other, so as to prevent persons in one station from knowing what is being done in the other. Every station will have to be provided with a table and seats for the use of the presiding officer and clerks, and must be furnished with such number of compartments, in which the voters can mark their votes screened from observation, as the returning officer thinks necessary, so that there is at least one compartment for every one hundred and fifty electors entitled to vote at such polling station. A ledge or desk should be placed in each compartment for the use of the voter when marking his ballot paper. Space will have to be provided in each

¹ The writer has seen nothing more satisfactory than a self-inking spring stamp, supplied by Messrs Alexander Kirkwood & Son, die-cutters, Edinburgh. The permanent die bears the words "Municipal Election, Edinburgh," but it contains provision for the insertion of combinations of letters, figures, or marks, which can be easily changed so as to secure secrecy. Each stamp is accompanied by four letters, which admit of thirty combinations.

See section 2, and rules 20 and 24 of schedule First of the Ballot Act.

station not only for the presiding officer and clerks, and for as many electors as there are compartments in the station, but also for such of the candidates and agents of candidates¹ as may wish to be present, and for the constables on duty.² The ballot box should be conveniently placed in front of the presiding officer's table, and on a level with it. Wherever practicable, each polling station should have a separate entrance and exit door. When existing buildings of a suitable kind cannot be obtained, and when in consequence the returning officer may be compelled to incur the expense of causing

¹ In England the agents for candidates in attendance at the polling stations are usually called "personation agents." See footnote 1 to No. 52 of these Observations, p. 74.

² It may be found advantageous that each polling station should contain on one side the seats of the presiding officer and his clerks, and of the candidates and agents entitled to attend, and on the other side the compartments into which the voters are to retire in order to mark their votes. It will be convenient so to arrange the room, that voters who have marked their papers can reach the ballot box and leave the station without meeting the fresh voters who are entering the station.—[Abstract of the provisions of the Ballot Act issued by the Home Office and by the Lord Advocate, article 21.]

See rules 15, 16, and 17 of schedule First of the Ballot Act.

In the Drogheda election case, tried before Mr. Justice Barry on 29th May 1874, various irregularities were proved to have taken place in the conduct of the election. In some of the polling stations, the voters, after receiving their ballot-papers, had to pass into another room out of view of the presiding officer, and there to mark their votes, returning to the room in which the presiding officer was to deposit the paper in the ballot-box. In going to and returning from the room in which the voters marked the ballot papers, they had to cross a landing, on which were at least three persons—the constable on duty, the committee-man or friend who brought up the voter, and another elector waiting his time to vote,—to any or all of whom the voter might have shown his marked ballot-paper, though it was not proved that this was done in any case. These and the other irregularities were reported by the election judge to the Court of Common Pleas in Ireland, with a view to their determining whether the election should be declared invalid. The Court, after hearing argument on the case, were equally divided in opinion, and pronounced no decision; whereupon the election judge sustained the election. In giving judgment, Mr. Justice Barry said, "I am bound upon the evidence to assume, and I do assume, that the election of the sitting member was the result of the choice of the electors honestly and

wooden booths to be put up, such form of booth may be adopted as may be considered most suitable, but in every case the internal arrangements of each polling station should be substantially such as have been described.¹

(4.) The ballot papers must have immediate attention. Section 2 of the Ballot Act provides that the ballot papers for each ward must show "the names and description" of the candidates; and rule 6 of schedule First of the act, in prescribing what the nomination paper is to contain, explains the description of the candidate to mean "his names, his abode, and his rank, profession, or calling." Rule 22, again, requires that every ballot paper shall contain a list of the candidates, described as in their respective nomination papers, and arranged alphabetically in the

fairly exercised, and in effect, with all the secrecy of the ballot; for in no one instance was a ballot-paper shown to or seen by an unauthorised person. In anything that has occurred, the sitting member, his agents, and his friends are wholly free from blame. He and they had no control whatever over the arrangements made by the sheriff. There was evidence in the case that his conducting agent disapproved of them. And the question for me is, am I, under these circumstances, to unseat this member, and declare this election void, for the mere act of the returning officer; an act for which the member, and his friends, and the electors are irresponsible; an act which was the result of a mere error of judgment on the part of the returning officer; an act by which the result of the election was in no degree affected; an act no doubt alleged to be illegal, but of which the illegality is so doubtful, that the judicial mind of the Court of Common Pleas, constituted as that Court is of men of conspicuous ability and experience, has, after full argument and consideration, failed to ascertain its existence?" [O'Malley and Hardcastle's Reports of Decisions on Election Petitions, vol. ii. p. 201.] This decision was approved of by the Court of Common Pleas in England in the case of *Woodward v. Sarsons & Sadler*, 9th July 1875. [L. T., vol. xxxii.; (N. S.), pp. 867-873.]

¹ Returning officers will exercise their own judgment in providing and fitting up polling places and polling stations, but convenient and inexpensive compartments may be formed of light wooden hinged frames, like ordinary hinged fire-screens, covered with canvas, and so constructed as to be secured to the floor by means of screws, and fixed overhead by moveable iron rods. Polling stations divided by means of such frames have been used in the municipal and school board elections in Edinburgh and other places, and have been found to answer admirably. As regards the number of polling stations, at each of which a presiding officer must officiate, see sub-divisions (13) and (14) of No. 46 of these Observations.

order of their surnames, and if there are two or more candidates with the same surname, of their other names. It must be in the form set forth in the Second schedule to the Ballot Act, or as near thereto as circumstances admit, and must be capable of being folded up. The surname of each candidate, and if there are two or more candidates of the same surname, also the other names of such candidates must be printed in large characters, and the names, addresses, and descriptions must be printed in small characters.¹

If two or more nominations of the same name are lodged with the town clerk, it is the duty of the returning officer to ascertain whether the nominations apply to the same person, and if they do, to enter the name of the candidate only once in the ballot paper, describing him as in the correct nomination paper, or appending to his name the descriptions in any of his nomination papers which differ, as thus: "William Anderson, described in one nomination paper as of 3 Waterloo Place, Edinburgh, and in another as of 16 Princes Street, Edinburgh."²

¹ See directions after form of ballot paper in schedule Second of Ballot Act.

² In the Barnstaple Municipal Election of 1874 a candidate was twice nominated,—one nomination being good and the other bad,—and his name appeared in the ballot papers twice, once in respect of each nomination. Seventy-one voters appended their marks to his name under one nomination, and three hundred and one under the other. All the voters so voting intended to vote for the candidate, and if both classes of voters could be added together, he had a majority, and was entitled to be returned. The Court of Common Pleas in England held that having been duly nominated, and having a majority of votes, he was entitled to be returned. But in delivering the judgment of the Court, Mr. Justice Brett made the following observation:—"The suggestion that the returning officer ought not to enquire whether two nominations of the same name do or do not apply to the same person, would lead to this, that if the same person were twice nominated for one vacancy, and no one else were nominated, yet there must be a poll by ballot for the two names, but one person. The statement of such a proposition proves its absurdity. It is obviously the duty of the returning officer to enquire whether nominations which might apply to one or to different per-

It is to be observed that the Ballot Act, and the form of ballot paper which it gives, contemplate a fuller designation of the candidate than is required by the form of nomination paper prescribed by the Municipal Elections Amendment (Scotland) Act, 1868. All, however, that the ballot paper in municipal elections can properly contain, is the name and designation of the candidate as given in the nomination paper, but arranged in conformity with the requirements of the Ballot Act. If, as has already been recommended, the nomination paper sets forth the "occupation" of the candidate, it will be given in the ballot paper; not otherwise.

Each ballot paper must have a number printed on the back, in small characters, and must have a counterfoil attached, with the same number printed on the face. The object of the numbering is to enable it to be ascertained, in the event of a scrutiny, how the votes have been given. All the ballot papers used in an election, at whatever station they are used, should therefore be numbered

sons are of the same or of different persons." By rule 22, "each ballot paper shall contain a *list of the candidates* described as in their respective nomination papers." A question is raised whether the name of a candidate twice nominated ought by virtue of this rule to be twice entered in the ballot paper. It is suggested that, if it is not, he will not be described as in his nomination paper. This is one of the sort of points which must arise upon such statutes. No one foresaw the exact difficulty of dealing in this respect with a double nomination. The answer to the difficulty seems to be, that inasmuch as the ballot paper is to contain a list of the *candidates*, and not a list of their *nominations*, the returning officer should enter the name of the candidate, and either describe him only as in his correct nomination paper, or append to his name the descriptions in any of his nomination papers which differ,—as this, "Charles Edward Northcote, described in one nomination paper as of Bridport Street, Barnstaple, gentleman, and in another as of South Street, Bishop Tawton, land agent." To enter his name twice, as if he were two candidates, is obviously wrong as a matter of sense, and is contrary to the words of the rule. The ballot paper in the present case was therefore wrongly drawn up. [Northcote v. Pulsford, 8th May 1875, L. R. (C. P.) vol. x. pp. 484, 485.]

in a continuous series.¹ The ballot paper should be easily separable from the counterfoil by means of a line of perforation, such as enables postage stamps to be easily separated one from the other; and there is convenience in having the ballot paper folded and pressed down in fold, so as to cause it to assume the same fold easily, previous to being deposited in the ballot box.²

(5.) A ballot paper must be provided for every elector in each ward; and though in no election do all the electors go to the poll, still it is expedient to provide extra ballot papers to supply the place of such papers as may be spoilt. In preparing for the first municipal election under the Ballot Act, ten per cent. was allowed for such contingencies, but the experience of that election showed this allowance to be much too great, and in no ward need more than four per cent. be provided on this account. Thus, for a ward which contains say two thousand five hundred electors, two thousand six hundred and twenty-five ballot papers would be sufficient. These ballot papers should be numbered consecutively from No. 1 to No. 2625, and should be bound up in books of moderate size, each containing say 100 papers. When the part of the register applicable to each ward is arranged and printed in the alphabetical order of the surnames of the persons registered as voters, and a certain number of names is assigned to each presiding officer, it will be easy to determine the number of ballot papers to be given to each. But when the part of the register applicable to each ward is arranged and printed in the alphabetical order of streets, squares, lanes, and other places in which houses are distinguished by numbers, and in which the subjects of qualification are situated, each such street,

¹ Abstract of the provisions of the Ballot Act, issued by the Home Office and Lord Advocate, art. 23.

² See section 2 of the Ballot Act, rule 22 of schedule First of that Act, and Directions as to printing the ballot paper appended to the form of ballot paper given in schedule Second of that Act.

square, lane, and other place being arranged according to the numbers of the houses, it is impossible, otherwise than by taking the experience of a former poll as a guide, to determine, within a considerable number, how many ballot papers should be given to the presiding officers who receive the votes of electors whose surnames begin with letters from A to E inclusive, or from F to L inclusive, and so on. There will therefore be advantage in having several volumes of ballot papers held in reserve at the polling place, to be got as needed by the presiding officers who poll votes in excess of the number of ballot papers originally supplied to them. Thus, in a ward containing 2500 electors, as already supposed, and having assigned to it say four presiding officers, it would be a prudent precaution to give each, at the commencement of the poll, 500 ballot papers. The remaining 625 should be deposited as a reserve with the officer presiding at the polling station No. 1, and given out on application to such presiding officers as need additional supplies. The returning officer should intimate to each presiding officer the number of ballot papers supplied to him, and it will be the duty of the presiding officer to account for these as for so many bank-notes.

(6.) In addition to the ordinary ballot papers described above, all of which will be printed on white paper, a supply printed on paper of a different colour must also be provided. These are called "tendered ballot papers," and are supplied exclusively to persons, each of whom represents himself to be a particular elector named on the register, and applies for a ballot paper after another person has voted as such elector. The tendered ballot papers for each ward will be the same as the ordinary ballot papers, except as regards the colour of the paper on which they are printed. They will be numbered consecutively from No. 1 to the end. As these can only be required in cases of personation, a very limited number will suffice. Each presiding officer must be furnished with a supply of these, say twenty-five, for which he

must account in the same way as for the ordinary ballot papers.¹

(7.) In large towns, when several wards are contested, and when the election in each ward is to all intents and purposes a distinct election, it may save time and prevent confusion to entrust the preparation of the ballot papers to more than one printer, giving the papers required say at the first, second, and third wards to one ; those required at the fourth, fifth, and sixth wards to another ; and those required at the seventh, eighth, and ninth wards to a third, and so on, and taking each printer bound to execute the work accurately within a specified time. Much anxiety may be avoided by having the arrangements for preparing whatever ballot papers may be needed completed as far as possible before the Thursday preceding the day of election.

The preparation of the ballot papers will also be greatly facilitated by having sheets of paper, with consecutive numbers printed upon them, ready to deliver to each printer immediately after the nomination of candidates has been completed. He will then have merely to print the letterpress of the ballot paper ; to separate the papers and stitch them up in the order of their numbers ; and afterwards to fold and press them. The printing of the numbers is the most tedious and expensive part of the process, but this may be greatly reduced by preparing sheets sufficient for say three municipal elections. Thus, in a burgh which is divided into say thirteen wards, it may be ascertained that in five of these wards 1500 ballot papers will be required, in three 2000, in two 2500, and in three 3000, for each election. To provide for three elections, accordingly, it would be necessary to print off thirty-nine sets of numbers from 1 to 1500 inclusive ; twenty-four sets from 1501 to 2000, both inclusive ; fifteen sets from 2001 to 2500, both inclusive ; and nine sets from 2501 to 3000, both inclusive. These would suffice for three contested elections in all the wards. When elec-

¹ See rule 27 of schedule First of the Ballot Act.

tions in particular wards are not contested, the papers so saved will be available on subsequent occasions; and as nothing need be printed save the consecutive numbers, the sheets will serve for any election in any ward or burgh, and at any time.

(8.) Every compartment must contain a suitable pencil with which the voter may mark his vote. The pencil should be attached by a string to the ledge or desk.

(9.) A supply of the following papers will also have to be prepared :—

(a.) Statutory declaration that the person claiming to vote is the individual described in the municipal register.¹

Of these, probably fifty should be given to each presiding officer.

(b.) Statutory declaration of inability to read.²

Of these, probably fifty should be given to each presiding officer.

(c.) Tendered votes list.³

Two sheets of this list will be sufficient for each presiding officer.

(d.) List of votes marked by the presiding officer.⁴

(e.) Statement of number of voters whose votes are marked by the presiding officer.⁵

Two sheets of this list and statement will be sufficient for each presiding officer.

(f.) Ballot-paper account, on which to show the number of ballot papers entrusted to the presiding officer, and how accounted for.⁶

Two sheets of this account will be sufficient for each presiding officer.

¹ See schedule (A.) of the Municipal Elections Amendment (Scotland) Act, 1868, and form No. 16 of Appendix XVI., p. [208].

² See schedule Second of the Ballot Act, and form No. 17 of Appendix XVI., p. [209].

³ See rule 27 of schedule First of the Ballot Act, and form No. 18 of Appendix XVI., p. [210].

⁴ See rule 26 of schedule First of the Ballot Act, and form No. 19 of Appendix XVI., p. [210].

⁵ See rule 29 of schedule First of the Ballot Act, and form No. 20 of Appendix XVI., p. [211].

⁶ See rule 30 of schedule First, and form No. 21 of Appendix XVI., p. [211].

- (g.) Directions for the guidance of voters in voting.¹
- (h.) Placard intimating arrangements for polling.²
- (i.) Placard to be posted up above each polling station, with reference to the placard (h.)³

The papers (g.), (h.), and (i.) should all be printed in conspicuous characters on sheets, with a view to being posted up outside and inside of each polling station; and in addition to those which are posted up by the order of the returning officer, three copies should be sent to each presiding officer, to enable him to provide against accident.

All the papers above enumerated, with the exception of those marked (g.), (h.), and (i.), may be used at any ward, and at any municipal election, so that they may be provided at any time.

(10.) In burghs in which the municipal register is printed in the alphabetical order of the streets, squares, &c. in each ward, a copy of so much of that part of the register as relates to each ward will have to be provided, certified by the town clerk, and furnished to each of the presiding officers in the ward. In those burghs in which the register is printed in the alphabetical order of the surnames of the persons registered as voters in each ward, either a copy of the register for the entire ward, or the portion of the register containing the names of the electors, beginning with certain letters of the alphabet, and assigned to each presiding officer, will have to be provided, similarly certified, and furnished to such presiding officer.⁴

(11.) A copy of the several Acts of Parliament relating to municipal elections, and precise instructions for the

¹ See form No. 15 (1.) of Appendix XVI., pp. [206], [207], and [208].

² See form No. 15 (2.) of Appendix XVI., p. [208].

³ See form No. 15 (3.) of Appendix XVI., p. [208].

⁴ See section 8, rule 20 and sub-section (a) of rule 64 of schedule First of the Ballot Act.

guidance of presiding officers, should also be provided for each presiding officer.¹

(12.) The machinery by which the election in each ward is to be conducted being thus provided, the returning officer must secure the services of competent presiding officers, polling clerks, and persons to assist him in counting the votes.² But no person must be appointed by him to act in any way in connection with an election who has been employed by any other person in or about the election.³ The fees of the persons so employed, other than the agent of the returning officer, who if a professional man will be entitled to the usual professional remuneration, are prescribed in section 16 of the Ballot Act, sub-section (5) of which enacts that the fee to be paid to each presiding officer shall in no case exceed the sum of three guineas per day, and the fee to be paid to each assistant to the returning officer shall not exceed two guineas per day, and the fee to be paid to each clerk shall not exceed one guinea per day.

The officers who preside at each polling station are called presiding officers in the Ballot Act,⁴ and they are not

¹ These acts are collected and annotated in the Appendices as under noted.

For Royal Burghs, Appendices Nos. I. IV. V. VI. VII. VIII. IX. X. and XIII.

For Parliamentary Burghs, Appendices Nos. I. II. III. IV. V. VI. VIII. IX. X. and XIII.

For Police Burghs, Appendices Nos. I. IX. X. XI. XII. and XIII.

Instructions for the guidance of presiding officers will be found in Appendix No. XVII. pp. [227]-[237.]

An annotated edition of the acts applicable to Royal Burghs, Parliamentary Burghs, and Police Burghs respectively, with instructions to presiding officers, may also be had separately.

² See rules 21, 33, and 48 of schedule First of the Ballot Act.

³ See rule 49 of schedule First of the Ballot Act.

⁴ Rule 21 of schedule First of the Ballot Act provides that the returning officer "shall appoint a presiding officer to preside at each station," but rule 47 provides that the returning officer "may, if he thinks fit, preside at any polling station." In cases, therefore, in which only one polling station is required, and the returning officer chooses to preside, it will not be necessary for him to appoint any presiding officer.

required by that act to have any special professional qualification. The corresponding officers under the acts 3 and 4 Will. IV., cap. 76 and 77, are called legal substitutes of the provost or chief magistrate, and they are required to be Advocates, or Writers to the Signet, or Solicitors before the Supreme Courts, or Procurators in the Inferior Courts, of not less than three years' standing. Difference of opinion having existed as to whether the qualifications thus prescribed are affected by the provisions of the Ballot Act, the question was submitted to Mr. A. R. Clark, then Solicitor-General, now Dean of Faculty, and Mr Watson, now Solicitor-General, who expressed the opinion that presiding officers appointed to superintend the poll at stations under the Ballot Act must still possess the qualifications prescribed by section 8 of 3 and 4 Will. IV., c. 76.¹

No question can arise in regard to polling clerks and assistants. Returning officers will doubtless take care that the persons whom they appoint to discharge these duties are competent for the task.

(13.) Having fixed, it may be a week previous to the election, upon the persons who are to be invited to act as presiding officers and polling clerks at such elections as may be contested, means must be taken to ascertain whether they will agree to act. This may be done by means of circulars,² and the answers received to these circulars will enable a list to be prepared of persons willing to act in the capacities of presiding officers and poll clerks respectively. After the lodgment of the several nominations with the town-clerk on the Thursday immediately preceding the day of election, it will be seen in what wards contests are to take place, and the number of presiding officers and clerks needed will be determined.

¹ See Memorial and Opinion, Appendix XV., pp. [166], [184], and [185].

² See forms of circulars, Appendix XVI., Nos. 2 (1) and (2), p. [193].

(14.) Under the system of open poll, it was found in Edinburgh that, in wards containing a small proportion of working men and others who could only record their votes during the usual hours for meals, from 700 to 800 electors might, without inconvenience, be assigned to each presiding officer with two clerks. But in wards in which a large proportion of the electors were working men, and others similarly situated as regards time, and in which every facility had to be given for receiving the largest possible number of votes within the two hours assigned for meals, a presiding officer and two clerks were assigned to every 600 electors, or thereabout. No change was made in this respect at the municipal elections of 1872, 1873, and 1874, except in wards in which it was presumed that there was a considerable number of electors unable to read, or prevented by physical causes from voting in the usual manner. Every such case necessarily causes considerable delay, and therefore a presiding officer with two clerks were assigned to every 450 electors in such wards. But the concurrent opinion of almost all the presiding officers who were engaged in these municipal elections was that after another election or two had taken place, and the electors had become acquainted with the working of the Ballot Act, a much larger number of electors might, in ordinary circumstances, be assigned to each presiding officer than under the system of open poll. In Glasgow, where a larger proportion of the electors than in Edinburgh consists of working men, a presiding officer and two clerks were, as a rule, assigned to every 450 electors in the municipal elections of 1872; but in subsequent elections, the proportion of presiding officers and clerks has been reduced, and no competent officer can have difficulty, even in a ward where a large proportion of the electors are working men, in polling from 600 to 700 votes, without occasioning undue delay or inconvenience.

(15.) The voting will be considerably expedited by increasing the number of voting compartments in each polling station, where this is practicable. The Ballot Act

requires one compartment for every 150 voters who are entitled to vote in each polling station, but in special circumstances, in particular wards, a compartment might be provided with advantage for each 100 or 120 persons entitled to vote.

(16.) The attendance of those who are to be asked to undertake the duties of presiding officers and poll clerks will be required, by circular, on the Saturday or Monday preceding the day of election.¹ Those who attend in compliance with these circulars, will then make the statutory declaration of secrecy² before the returning officer or a Justice of the Peace. No other declaration and no oath need be taken by any presiding officer or polling clerk on the occasion of an election. It will be prudent to administer the declaration of secrecy to two or three persons qualified to act as presiding officers, and to several polling clerks, more than appear to be required. At the last moment circumstances often occur to prevent the attendance of persons who have accepted office, and much trouble and anxiety may be saved by adopting the course above suggested. Three or four clerks should be in attendance at the office of the returning officer or his agent, before eight o'clock on the morning of the election day, ready to take the places of any clerks who may not be at the places assigned to them before the poll commences.

(17.) The appointments of presiding officers, assistants, and clerks do not require to be stamped.³ The appointment of the presiding officer and clerks to each polling station should be transmitted by letter to the presiding officer on the eve of the election,⁴ and at the same time

¹ See form of circulars, Appendix XVI., No. 7, p. [198].

² See form of declaration, Appendix XVI., No. 12, p. [202].

³ See forms of appointment (1.) of presiding officers and clerks, Appendix XVI., Nos. 8 and 9, pp. [199], [200], [201]; and (2.) of assistants and clerks, Appendix XVI., No. 22, p. [212].

⁴ See form of circular to presiding officers, Appendix XVI., No. 13 (1.), p. [204].

each polling clerk should be informed by letter of the polling station to which he has been assigned.¹

(18.) In all burghs, except such as are relieved from question by clauses in local Acts,² doubts exist as to the person who should appoint presiding officers and make the arrangements preliminary to elections, when the provost or chief magistrate retires on the day of election, but other magistrates remain in office. The question is stated fully in the Memorial submitted in 1872 to Mr. A. R. Clark, then Solicitor-General, and now Dean of Faculty, and Mr Watson, now Solicitor-General, and their opinion is that, in cases where it is practicable, the appointments of presiding officers and clerks had better be made on the day of election by the magistrate who, on the retirement of the provost or chief magistrate on that day, becomes the acting chief magistrate and returning officer; but in cases where that course is not practicable, a joint appointment by the provost or chief magistrate and the magistrate who, on his retirement, will become the acting chief magistrate, confirmed by the latter on the morning of the election, will be sufficient compliance with the act.³

47. The returning officer may, if he think proper, preside at any polling station, and may exercise all the powers and functions conferred by the Ballot Act on presiding

¹ See form of circular to polling clerks, Appendix XVI., No. 13 (2), p. [204].

² "The Edinburgh Municipality Extension Act, 1856," section 16, enacts "that the appointment by the lord provost or senior magistrate, immediately before any annual election, of legal substitutes to preside at the polling places, and of persons to officiate as poll clerks in the several wards, shall be valid, notwithstanding the going out of the lord provost or senior magistrate after the making of such appointment."

³ See Memorial and Opinion, Appendix XV., pp. [169]-171], and [187].

See forms of appointments of presiding officers and clerks, and of the subsequent confirmation, Appendix XVI., Nos. 9 and 14, pp. [200], [201], and [205], [206].

officers.¹ But he cannot receive the remuneration which that act allows to presiding officers. On the latter point, Mr A. R. Clark and Mr Watson held and expressed at consultation a decided opinion to the effect above stated.

48. On the evening of the day preceding the election, the returning officer, or his agent, will see that all the instruments for marking the ballot papers with the secret mark are adjusted and in working order. When they are so, they must be sealed up by himself or by assistants who have taken the declaration of secrecy, and arrangements will be made with a view to an instrument being placed in the hands of each presiding officer before eight o'clock on the morning of the election. The presiding officer will break the seal at eight o'clock, and will then for the first time know what is the secret mark to be used in that election. As a precautionary measure, one or two instruments should be kept sealed up in reserve at each polling place in case of accident to the instruments which the presiding officers are using.²

49. The returning officer, or his agent, will at the same time see that all the articles necessary for the conduct of the election are sent to each polling station, to be in readiness for the presiding officer before 8 o'clock next morning.³

¹ See rule 47 of schedule First of the Ballot Act, 1872, and footnote 4 to No. 46 of these Observations, sub-section (12), p. 62.

² When the stamping instrument above described is used, the returning officer or his agent, will determine what is to be the combination of letters for the year. An assistant sworn to secrecy will make the requisite adjustment, the stamp will be tried, and if found correct will be placed in its box, sealed up, and sent to the polling station, where it will be in readiness for the presiding officer.

³ These articles are the following:—

1. A collection of the acts regulating Municipal Elections.
2. A ballot-box and cover, or materials for enclosing it in a separate sealed packet, in terms of Rule 29 of schedule First of the Ballot Act. To each ballot box a label should be attached, having inscribed upon it the name or number

50. The returning officer or his agent, will also arrange for having the placards containing directions for voting posted up conspicuously on the outside of every polling station, and in every compartment of every polling station;¹ as also for posting up placards outside and inside of every polling station, intimating the arrangements for polling in each station, and the number of each station.

51. Provision must be made by the returning officer for having constables on duty at each polling station.²

of the polling place, and the number of the polling station at which it is to be used.

3. Sealing wax, with vestas and tapers, three small bottles of writing ink, and a supply of pens.
4. Books containing ballot papers for ordinary votes printed on *white* paper.
5. A book containing ballot papers for "tendered votes," printed on *green* paper.
6. An instrument for marking the ballot papers by stamping thereon the secret official mark.
7. Pencils for each compartment, with which the voters may mark their votes on the ballot papers.
8. A copy of the register of voters for the particular ward certified by the town-clerk.
9. Two lists or sheets, titled "List of Votes marked by the Presiding Officer," having annexed a schedule, titled "Statement of number of voters whose votes are marked by the presiding officer."
10. Two lists or sheets, titled "The Tendered Votes List."
11. Two sheets entitled "The Ballot Paper Account."
12. Fifty printed Declarations of Inability to Read.
13. Fifty printed Declarations that the person claiming to vote is the individual described in the municipal register.
14. Six copies of each of the placards (*g*), (*h*), and (*i*), referred to in sub-division (9) of No. 46 of these Observations.
15. Six large cloth envelopes in which to seal up papers.

¹ See form of directions in schedule Second of the Ballot Act, 1872.

² In the Gloucester election case, tried before Mr. Justice Blackburn on 15th July 1873, it appeared that at the parliamentary election in dispute each of the candidates provided constables in equal proportions, to keep order in the polling stations. Mr. Justice Blackburn condemned the arrangement, and said that it would be better in future to leave the appointment of the constables to the returning officer and local authorities.—O'Malley & Hardcastle's Reports of Decisions in Election Petitions, vol. ii. p. 62.

These constables should be on duty half an hour at least before the opening of the poll, to see that the polling station and accesses thereto are kept clear, and that no interruption is offered to those engaged in taking the poll, or to electors who come up to vote. It will be prudent to administer the declaration of secrecy to all the constables who are to be in attendance at the polling stations. This can be done on the evening of the day preceding the election.

(4.) *Attendance of Candidates and Agents of Candidates at various stages of election proceedings.*

52. In Parliamentary elections in Scotland, the candidates may respectively appoint agents to attend at the polling stations,¹ and also to attend the counting of the votes.²

There is nothing in the Ballot Act to authorise candidates in municipal elections to appoint agents; and practically the appointment of agents for these purposes will not only be unattended by any advantage to the candidates, but may, when many candidates appoint agents, seriously interfere with the polling arrangements, by overcrowding the necessarily limited space in each polling station. If, however, any candidate does appoint an agent, and notice of the appointment is given to the returning officer,³ the provisions of the Ballot Act in

¹ See rule 59 of schedule First of the Ballot Act. Nothing is said in the act as to the purpose for which agents may be appointed to attend the poll in Scotland. Rule 57 of schedule First declares the expression "agents of the candidates," used in relation to a polling station, to mean agents appointed in pursuance of section 85 of the Act 6 and 7 Victoria, cap. 18. This act does not apply to Scotland. The agents authorised to be appointed under section 85, are "for the purpose of detecting personation." Agents in attendance at polling stations in England are thus known as personation agents.

² See rule 31 of schedule First of the Ballot Act.

³ See forms of appointment and notice, Appendix XVI., Nos. 10 and 11, pp [201], [202].

regard to the agents of candidates in parliamentary elections apply to agents in municipal elections.¹ These are the following:—

(1.) No returning officer, nor any officer appointed by him in pursuance of the Ballot Act, nor the partner or clerk of either of them, can act as agent for any candidate in the management or conduct of his election; and if any returning officer, or officer appointed by him as the partner or clerk of either of them, shall so act, he will be guilty of a crime and offence.²

(2.) The name and address of every agent so appointed to attend the counting of the votes must be transmitted to the returning officer one clear day at the least before the opening of the poll; and the returning officer may refuse to admit to the place where the votes are counted any agent whose name and address have not been so transmitted, notwithstanding that his appointment may be otherwise valid.³

(3.) If any agent so appointed for the purpose of attending at the polling station or at the counting of the votes, dies, or becomes incapable of acting during the time of the election, the candidate may appoint another agent in his place, and must forthwith give to the returning officer notice in writing of the name and address of the agent so appointed.⁴

(4.) Every agent authorised to attend at a polling station must, before the opening of the poll, make the statutory declaration of secrecy in the presence of a justice of the peace or of the returning officer. He need not make any other declaration, or take any oath on the occasion of the election.⁵

When an agent takes the declaration of secrecy before

¹ See sub-section (6) of section 20 of the Ballot Act.

² See sections 11, 16 (1), and 20 of the Ballot Act; and section 50 of "The Representation of the People Act, 1867."

³ See rule 52 of schedule First of the Ballot Act.

⁴ See rule 53 of schedule First of the Ballot Act.

⁵ See rule 54 of schedule First of the Ballot Act.

the returning officer, he should be furnished with a certificate that his appointment has been duly made and intimated.¹ Production of this certificate to the presiding officers at the several polling stations in the ward in which the agent has been appointed to act, will be their authority for admitting him to the polling stations.

(5.) When any act or thing is appointed by the Ballot Act to be done in the presence of the agents of the candidates, the expressions containing such appointment must be deemed to refer to the presence of such agents of the candidates as may be authorised to attend, and as have in fact attended, at the time and place when such act or thing is being done; and the non-attendance of any agents or agent at such time and place shall not, if such act or thing be otherwise duly done, in anywise invalidate the act or thing done.²

(6.) A candidate may himself undertake the duties which any agent of his, if appointed, might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent is entitled to attend.³

¹ See form of certificate, Appendix XVI., No. 11, p. [202].

² See rule 55 of schedule First of the Ballot Act.

³ See rule 51 of schedule First of the Ballot Act, and footnote 4 to No. 56 of these Observations.

The question whether rule 51 should be construed as giving candidates only a limited right of being present, to the same effect as if the words "for such purposes" were added to it, was considered fully in the case of *Clementson v. Mason*, 25th February 1875, and on that subject Mr. Justice Brett observed as follows:—"The final question then is, whether words should be also added to this rule 51. Nothing can be more difficult to determine. If the candidate has this absolute right, it is a useless and barren right to him, unless it be that it will give him the power of dealing with a servant or tenant of his own, either for not coming to vote at all, or, if the servant or tenant be illiterate, or blind, or unable from physical defect to make a mark, for voting against him. Can it be that the words are to be construed so as to give him such a barren and useless or mischievous right, when all the other provisions of the statute seem to ignore or militate against such a right? With much distrust, I come to the conclusion that, whatever the real intention may have been, our duty is to stand by the ordinary and grammatical construction of the last sentence

(7.) All notices required to be given to an agent by the returning officer may be delivered at or sent by post to the address as furnished to the returning officer.¹

53. It is a noticeable circumstance that while the Ballot Act contains anxious enactments for securing secrecy on the part of returning officers, presiding officers, clerks, and agents, its provisions for securing secrecy on the part of candidates,—who are afforded all the facilities for obtaining information which their agents have,—are very defective. A candidate may attend the poll and the counting of the votes, but he is not required by the act to take the declaration of secrecy. This anomaly was brought, in 1872, under the consideration of Mr. A. R. Clark, then Solicitor-General, and now Dean of Faculty, and Mr. Watson, now Solicitor-General, and they were asked whether, in their opinion, it could be held that a candidate who undertakes the duties which any agent of his, if appointed, might undertake, becomes subject to all the obligations to which the agent would be liable, and specially that of secrecy ;

in the rule, as there is no overwhelming ground for otherwise interpreting it. This is the rule of construction which this Court has before declared must be rigidly applied to statutes of this kind. Although there are strong grounds, to be collected from the consideration of other parts of the statute and its schedules, for suspecting that the intention was to give only a limited right to the candidate of being present, as such, at the polling stations and at the place for counting the votes, still there is nothing to make it sufficiently certain that the words ought not to be construed according to their ordinary and grammatical signification : and then they signify that the candidate may, as such, be present at any polling station and at the place of counting the votes. The word 'candidates' is the word which must be read into the exceptions in rules 21 and 33. Nothing must be read into this rule 51." [L. R. (C. P.), vol. x. p. 209.]

The judgment of Mr. Justice Brett, it was stated, was concurred in by Sir Henry Keating, who had previously resigned as judge. Mr. Justice Denman adopted the same view, and stated as follows :—

"The words of the clause are unlimited ; and it would require the insertion of other words,—such as, 'for that purpose,' or 'for either of the purposes aforesaid,'—in order to restrict their application to the two special purposes mentioned in the earlier part of the clause. This I do not feel at liberty to do, from a mere suspicion, however strong, that it might have been the intention of the legislature that the right of the candidate should be so restricted."

¹ See rule 52 of schedule First of the Ballot Act.

and also, whether provosts or chief magistrates acting as returning officers should require all candidates to take a declaration of secrecy as a condition of being admitted to a poll or to the counting of the votes.¹ Their opinion was given to the effect that, while it appears contrary to the spirit of the act that a candidate should be permitted to undertake these duties without having first made the statutory declaration of secrecy, they could not, in the absence of any words of enactment bearing either directly or indirectly upon the matter, advise returning or presiding officers to undertake the responsibility of excluding candidates who decline to make such declaration. In such circumstances, if candidates intend to avail themselves of the power conferred by the 51st rule, and to be present in the polling station or at the counting of the votes, they would do well to conform to the spirit of the act, by taking the declaration of secrecy, and acting rigidly according to its requirements. If, however, they do not take the declaration of secrecy, there are no means of compelling them to do so;² and they should not be excluded either by presiding officers or by returning officers from the polling station or from the counting of the votes. It will be prudent to give to candidates the same intimations as to the time and place of counting the votes as the Ballot Act appoints to be given to the agents of candidates.³

(5.) *Arrangements for Taking the Poll.*

54. The presiding officers and clerks should be at their posts at least twenty minutes before eight o'clock A. M., so that they may be ready to begin punctually at eight o'clock,⁴

¹ See sections 4 and 16, sub section (2), and rules 33 and 54 of schedule First of the Ballot Act.

² See opinion of Mr. Justice Brett in *Clementson v. Mason*, 25th February 1875, [L. R. (C. P.) vol. x. p. 214.]

³ See Memorial and Opinion, Appendix XV., pp. [174], [176], and [186].

⁴ See 3 and 4 Will. IV., cap. 76, section 9, and 3 and 4 Will IV., cap. 77, section 6. See No. 77 of these Observations.

when the poll is appointed to commence. Each presiding officer should have two clerks, and be provided with the several articles enumerated in the footnote to No. 49 of these Observations. He should also have a private seal wherewith to seal up the ballot box and papers.¹

55. In so far as the arrangements for voting in each polling station have reference to the letters of the alphabet with which the surnames of the voters begin, they should be explained in placards posted up outside and inside of the polling station, and six copies of each of these placards should be furnished to the presiding officer, to enable him to provide against accident. Each presiding officer should see, before the poll begins, that copies of these placards are posted up outside and inside of the polling station under his charge. The directions to voters in voting should also be posted up in each compartment, and the presiding officer should see that this is done. No person must be admitted to vote at any polling station except the one allotted to him.²

56. It is the duty of the presiding officer to keep order at his station. Before the poll commences he should regulate the number of electors to be admitted into the polling station at a time,³ and should instruct the police constables on duty at the station accordingly. It is expedient that not more electors should be within the polling station at one time than there are compartments in the station, and all other persons should be excluded, except the clerks, the candidates, the agents of the candidates, and the constables on duty.⁴ Only one agent for each candidate should be allowed into each polling station; and each agent should produce, as the warrant for his

¹ See rules 23 and 29 of schedule First of "The Ballot Act, 1872."

² See rule 18 of schedule First of the Ballot Act.

³ See rule 21 of schedule First of the Ballot Act.

⁴ See rules 21, 59, and 51 of schedule First of the Ballot Act.

Rule 21 directs the presiding officer to exclude all persons, "except the clerks, the agents of the candidates, and the constables on duty." But rule 51 enacts that "a candidate may be present

admission, a certificate under the hand of the returning officer that he is entitled to admission.¹

57. The presiding officer should have before him the ballot box, the stamping instrument, and the several lists or sheets enumerated in the footnote to No. 49 of these Observations, and should be placed so as to command a full view of the compartments in the polling station under his charge.² One of the clerks should have before him the copy of the register of voters for the ward; and the other clerk should have before him the books containing the ballot papers. The clerks should be so placed that the presiding officer may overlook their work; and it is of great importance that he should not only rigidly adhere to the provisions of the Ballot Act himself, but secure strict adherence to them on the part of the clerks.³ Failure of duty in this respect may vitiate the election, and subject the presiding officer to questions of personal responsibility.⁴

58. Just before the commencement of the poll, the presiding officer must show the ballot box empty to such

at any place at which his agent may, in pursuance of this act [the Ballot Act] attend." The Court of Common Pleas in England have held, in the case of *Clementson v. Mason*, 25th February 1875 [L. R. (C. P.), vol. x. p. 209], that in virtue of the 51st rule, a candidate has a right to be present, as such, along with his agent, at any polling station, and at the place appointed for the counting of the votes, without being called upon to assign any reason as to the cause of his presence.

See also No. 68 of these Observations, pp. 88, 89.

¹ See form of appointment of agents of candidates, and of certificate by the provost or chief magistrate. Appendix XVI., Nos. 10 and 11, pp. [201], [202].

² See the Drogheda election case, 29th May 1874, referred to in note to No. 46, subsection (3), of these Observations, pp. 58, 59.

³ For the convenience of the presiding officers and others engaged in elections, these provisions have been formulated into specific instructions, which see in Appendix No. XVII., pp. [227], [237].

⁴ See section 11 of the Ballot Act.

See also *Pickering v. James*, 10th June 1873 [L. R. (C. P.), vol. vii. p. 489], referred to in the footnotes to Nos. 61 and 74 of these Observations.

persons, if any, as may be present in the polling station, so that they may see that it is empty, and must then lock it up, and place his seal upon it in such manner as to prevent its being opened without breaking the seal,—the aperture in the top of the box being left open for receipt of the ballot papers. The ballot box must, thereafter, be placed in view of the presiding officer for the receipt of ballot papers, and kept so locked and sealed.¹

59. When an elector appears, the clerk who has before him the copy of the register of voters should ascertain his name and exact address, and look up the entry applicable to him in the register.² Having found it, he must call out the number, name, and description of the elector, as stated in the register, and put a distinct mark in the register against the number of the elector to denote that he has received a ballot paper, but without showing the particular ballot paper which he has received. As there may be many persons of the same name in each ward, great care should be taken to secure accuracy.³ If the name of the person who claims to vote does not appear on the register according to which the votes are ap-

¹ See rule 23 of schedule First of the Ballot Act.

² In practice, the elector, when he presents himself, frequently hands the presiding officer or polling clerk a card, furnished to him on behalf of one or other of the candidates, containing the number of the elector on the register. There can be no objection to the use of this card if it facilitates the finding of the elector's name. But in every case the name and address of the elector should be stated by himself before he is supplied with a voting paper. In the Warrington case, tried before Mr. Justice Martin on 4th February 1869, the judge observed—"The ticket is merely given to the voter to enable him to vote with greater ease; it has nothing to do with the voting. Properly speaking, the poll clerk ought to have nothing to do with tickets, but he should take from the mouth of the voter 'for whom' he votes, his number on the register, and his address." [O'M. and H. Reports, vol. i. p. 46.] Since the passing of the Ballot Act, of course, the question 'for whom' the elector votes is not put.

³ See rule 24 of schedule First of the Ballot Act.

pointed to be taken,¹ his vote cannot be received. The mere misnaming or inaccurate description of an elector in the register, however, should not prevent his vote from being received, provided the presiding officer be satisfied that the entry in the register is really intended to apply to the person who claims to vote,² and he takes the declaration of identity prescribed by "The Municipal Elections Amendment (Scotland) Act, 1868."³

60. The other clerk, who has before him the books containing the ballot papers, should, whenever the number of the elector is so called out, write the number on the counterfoil, repeating the number aloud so as to ensure accuracy,⁴ after which he should detach the ballot paper from the counterfoil and hand the paper to the presiding officer.⁵

61. The presiding officer must then mark the ballot paper with the official mark, but only once on each side. If a perforating or embossing stamp be used, one impression will be sufficient, as the mark will be visible on both sides. Whatever stamp be used, however, the presiding officer should see that the mark is distinct on both sides of the ballot paper. When properly marked, the paper should be handed to the voter, who must forthwith proceed into one of the compartments in the polling

¹ See the Acts 3 and 4 Will. IV., cap. 76, section 8; and 3 and 4 Will IV., cap. 77, section 4.

² See 3 and 4 Will. IV., cap. 76, section 35, and "The Municipal Elections Amendment (Scotland) Act, 1868," section 8; see also Nos. 64, 68, and 76 of these Observations.

³ See No. 68 of these Observations.

⁴ In the case of *Pickering v. Startin*, 13th January 1872, it was objected to certain votes at the Birmingham municipal election in 1872 that the returning officer had neglected to insert in the counterfoils of the voting papers the numbers of the voters appearing in the burgess roll. The report of the case does not show that any decision was given on the objection. [L. T. (N. S.) vol. xxviii. p. 111.]

⁵ See rule 24 of schedule First of the Ballot Act.

station, and there, with the pencil provided in the compartment, secretly mark the paper by placing a cross, thus X, on the right-hand side opposite the name of each of the candidates for whom he votes, then fold the paper up so as to conceal his vote, and after showing the official mark on the back to the presiding officer, deposit the paper so folded up in the ballot box in the presence of the presiding officer, and immediately leave the station.¹ The presiding officer must allow no paper to be deposited in the ballot box except such as bears upon it the official mark.² Neglect of this rule occasions great inconvenience

¹ See section 2 of the Ballot Act ; rules 24 and 25 of schedule First of that Act ; and form of directions for the guidance of the voter in voting, appended thereto.

In the case of *Pickering v. James*, 10th June 1873, the Court of Common Pleas in England held that the Ballot Act, by implication, imposes a duty *prima facie* on the presiding officer at a polling station during an election to deliver to the voters voting papers bearing the official mark appointed under the act for the election, and to be present during such election at the polling station, so that the voters, before depositing their voting papers in the ballot box, can show to him the official mark on the back of such papers, in accordance with the statute. For breach of these duties, being purely ministerial, an action will lie by a party aggrieved,—*e.g.*, who has thereby lost the election through votes given to him being void for want of the official mark,—without alleging malice or want of reasonable care on the part of the defendant. [L. R. (C. P.), vol. viii. p. 489 ; L. T., vol. xxix. p. 210.] In that case Chief-Justice Bovill and Mr Justice Grove expressed an opinion that the Ballot Act does not impose on the presiding officer the duty of ascertaining, before the voter deposits a voting paper in the ballot box, whether the official mark is on such paper. On the other hand, Mr Justice Keating and Mr Justice Brett held that the statute does impose such duty on the presiding officer.

See the judgment in *Pickering v. James*, quoted in the footnote to No. 74 of these Observations, pp. 103-108.

The minute directions of the Ballot Act as to the manner in which the voter is to mark his vote on the ballot paper, must be strictly adhered to, and any departure from the prescribed form may imperil the validity of the vote. See on this subject No. 90 of these Observations.

² See Nos. 70 and 72 of these Observations.

afterwards, and may, moreover, expose the presiding officer to personal claims of damage.¹

62. Though the Ballot Act directs the voter to mark his vote secretly, and to fold up his ballot paper so as to conceal his vote before placing the paper in the ballot box, it imposes no penalty on the voter who fails to do so; nor does it nullify any vote which may be displayed; nor does it empower the presiding officer to refuse to receive the voting paper of an elector who violates the secrecy thus enjoined. The presiding officer must therefore allow the ballot paper to be deposited in the ballot box.

¹ See *Hamilton v. The Police Commissioners of Dunoon*, 15th January 1875. In this case, the returning officer, who also acted as presiding officer in the election of police commissioners, which took place on 20th October 1873, impressed the whole of the ballot papers with his official mark "R," in the morning and before the poll opened, retaining all the papers and the stamping instrument in his own possession until after the election. The Lord Ordinary (Gifford), on 27th October 1874, held that the object of requiring the presiding officer to impress each ballot paper with the official mark at the time of giving it to the voter was to prevent the introduction into the ballot-box of any voting papers except those delivered by the presiding officer to the voters, and that this object was accomplished by the presiding officer keeping in his own custody all his marked voting papers and his stamping instrument all through the election. There could be no stamped voting papers in the ballot box but those given out by the presiding officer, who acted from the best motives, and his act did not affect the "principles" of the Ballot Act or the "result of the election." It was just such a mistake as is saved by section 13 of the Ballot Act. His Lordship added—"It was no doubt very ingeniously urged for the pursuer, that the irregularity in question was not only a violation of the rules in the schedule, but a violation of the Ballot Act itself (section 2), which contains, more shortly expressed, many of the rules contained in the schedule. It was argued that section 13 may save violations of the result but not violations of the Act itself. The Lord Ordinary thinks this is much too strict a reading. Undoubtedly the thing done was a contravention of the "rules," and as such it is saved by section 13, although it also occurs in the statute. The "rules" are expressly declared part of the statute, and it seems out of the question to hold that the non-strict compliance with everything in section 2 must, without any discretion in the Court, absolutely void every election. Besides, and altogether apart from section 13, there is room for the distinction between provisions directory and provisions absolute and indispensable. Directions to the returning officer may be fulfilled by equivalents if this is innocently done,—their violation does not at least necessarily annul the election. This principle seems to have been recognised as applicable to the Ballot Act in various English cases. See among

63. Though the Ballot Act declares that any ballot paper shall be void and not counted which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the number on the back is written or marked by which the vote can be identified, the presiding officer must allow the objectionable paper to be deposited, leaving it to be dealt with by the returning officer in counting the votes.¹

64. If any person appears and claims to vote who is obviously a minor, or *non compos mentis*, the presiding officer may exclude him from voting, though his name is entered in the register of voters. But the disqualification must be very apparent to warrant such exclusion.²

others *Pickering v. Startin*, 13th January 1873, 28 Law Times, 111; *Pickering v. James*, 10th June 1873, Law Reports, 8 C. P. 489; Borough of Hackney, 15th and 16th April 1874, 31 Law Times, p. 69. In these cases all the Judges seem to recognise the broad distinction between provisions which affect the "principle" of vote by ballot, and mere details which are arbitrary, and the object of which may be accomplished in various ways. See Mr. Justice Grove's opinion in the Hackney case." The interlocutors pronounced by the Lord Ordinary, dated 19th February 1874, 10th July 1874, and 27th October 1874, were reclaimed against, but were adhered to by the First Division of the Court, who sustained the election without pronouncing any opinion on the objections taken under the Ballot Act as to irregularities committed by the returning officer. These objections—which were disposed of by the Lord Ordinary's interlocutor of 27th October 1874—would, it was remarked by the Lord President, and by Lord Ardmillan, if sustained, have had the effect of annulling the entire election, but could not be entertained under the conclusions of the summons. Both their Lordships, however, observed that the manner in which the returning officer dealt with the stamping of the ballot papers was a very serious irregularity. Whether or not it would void the election was a question on which they expressed no opinion. [Session Cases (Fourth Series), vol. ii. p. 299; The Scottish Law Reporter, vol. xii. p. 257.]

¹ See section 2 of the Ballot Act; and rules 25 and 36 of schedule First of that Act.

² The Education (Scotland) Act, 1872, provided by section 12, subsection (2), that the electors of the School Boards should "consist of all persons, being of lawful age, and not subject to any legal incapacity," whose names were entered in the latest Valuation Roll. The then Lord Advocate (now Lord Young), in an opinion given to the Town Council of Glasgow on 4th

On the same principle, it appears to the writer, the presiding officer should withhold a ballot paper from a woman if she claimed to vote, though her name may possibly have been placed on the municipal register.¹

65. On the application (1) of any voter who is incapacitated by blindness or other physical cause from voting in the manner prescribed by the act; or (2) of any voter who declares that he is of the Jewish persuasion, and objects on religious grounds to vote in the manner prescribed by the act, if the poll be taken on a Saturday; or (3) of any voter who makes the statutory declaration of inability to read, and which must be made in the way and manner hereinafter explained, the presiding officer must, in the presence of the candidates or of the agents of the candidates, cause the vote of such voter to be marked on one of the ordinary ballot papers, printed on white paper, in manner directed by such voter, and the ballot paper to be placed in the ballot box. If in marking such votes the presiding officer uses ink, he should be careful to dry the mark before folding the ballot paper, otherwise the mark may be

February 1873, held the words "legal incapacity" (which are the same as those employed with reference to parliamentary and municipal elections) to signify such incapacity as attaches to minors and persons *non compos mentis*, and said "the presiding officers at the polling places must judge of the age and capacity of persons presenting themselves as electors." The then Solicitor-General, and now Dean of Faculty (Mr. A. R. Clark), also in an opinion which he gave to the Town Council of Edinburgh on 1st March 1873, said, "I am of opinion that the returning officer [in the School Board Election] is entitled to exclude such persons as are minors or insane, or are known to be so. I further think that he would be entitled to exclude such persons from voting as are obviously under age, or are *non compos mentis*, though they are entered in the list of voters. In these matters he is, I think, vested with a discretion, though I think he ought not to exercise it in the way of excluding votes, unless there is very apparent disqualification."

¹ *Brown v. Ingram*, 19 December 1868, 7 M'Pherson, 281.

duplicate and questions raised.¹ The name and number on the register of voters of every voter whose vote is so marked, and the reason why it is so marked, must be entered on the list called "The List of Votes marked by the Presiding Officer." The declaration of inability to read should be made by the voter, at the time of polling, before the presiding officer, who should attest and retain it² till the close of the poll, when it must be put up in a packet and transmitted to the returning officer, in the manner explained in No. 78 of these Observations.³

66. As the purpose of the Ballot Act is to secure

¹ In the Birmingham municipal election of 1874, two ballot papers, marked in ink, had been folded up,—thereby causing a corresponding mark on another part of the paper. These papers, along with others marked with more than one cross, were sustained by the returning officer, at the counting of the votes, without objection, but were afterwards objected to as being marked with more than one cross. The Court of Common Pleas in England, however, repelled the objection. [Woodward v. Sarsons, 9th July 1875, L. T., vol. xxxii., pp. 867-873.]

² See rule 26 of schedule First of the Ballot Act. See form of declaration and attestation, Appendix XVI., No. 17, p. [209].

³ In the Birmingham municipal election of 1874, about twenty ballot papers were marked by the presiding officer at the polling station No. 125, by the direction of voters who were unable to read. Each of these ballot papers was placed by the presiding officer in the ballot box, wrapped up in the "declaration of inability to read" made by the voter for whom such vote was marked. Each of the votes so given and so marked by the presiding officer could have been, but none was, in fact, identified by the returning officer at the counting of the votes, by comparing the ballot papers with the declarations of inability to read in which they were wrapped. The returning officer sustained all these votes, which were afterwards objected to on the ground that the folding up of the ballot papers of the illiterate voters in the declarations of inability to read amounted in effect to a clear breach of the enactment by section 2 of the Ballot Act, that "the votes shall be given by ballot," and was, moreover, a contravention of rule 29 of schedule First of the Act, which requires these declarations to be made up by the presiding officer, at the close of the poll, into a separate packet, sealed with his seal, and so delivered to the returning officer. The Court of Common

secrecy in voting, the presiding officer should, before taking such votes, cause the polling station to be cleared of all persons except the voter, the clerks, the candidates and their agents.¹

67. If a person representing himself to be a particular elector named on the register applies for a ballot paper after another person has voted as such elector, the applicant, upon taking the declaration prescribed in schedule (A) of "The Municipal Elections Amendment (Scotland) Act, 1868,"² which declaration the presiding officer should administer, will be entitled to mark a ballot paper in the same manner as any other voter; but the ballot paper to be used must be that printed on green paper, and must not be put into the ballot box, but must be given to the presiding officer, and indorsed by him with the name of the voter and his number in the register, and set apart in a separate packet.³ The name

Pleas in England held that "there was a breach by the presiding officer of the directions in rule 26, but there was no breach for which by enactment the ballot papers can be rejected. The votes were given in the way prescribed, but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted." [Woodward v. Sarsons, 9th July 1875, L. T., vol. xxxii. pp. 867-873.]

¹ See rule 26 of schedule First of the Ballot Act.

This rule appoints such votes to be marked "in the presence of the agents of the candidates," and does not refer to the candidates, whose presence does not appear to be contemplated in this and several other provisions of the act [*e.g.*, sections 4 and 11, and rule 21]. The inconvenience of a candidate being present when votes are being marked is obvious. But the express enactment of rule 51 has been held by the Court of Common Pleas in England to confer the right on candidates to be present in the polling station, and at the counting of the votes. [Clementson v. Mason, 25th February 1875, L. R., (C. P.) vol. x. p. 209.]

² See form of declaration, Appendix XVI., No. 16, p. [208].

³ See rules 27 and 30 of schedule First of the Ballot Act.

In the case of *Pickering v. Startin*, 13th January 1872, it was objected, but the report does not show that any decision was given on the objection, that certain "tendered ballot papers were used as ballot papers, and were put into the ballot box, and afterwards

of the voter and his number on the register must also be entered in the "Tendered Votes List." Tendered ballot papers are not counted by the returning officer.¹

68. The only facts which may be competently inquired into at any poll, are the identity of the party tendering a vote, and his not having previously voted at the same election; and these can be proved only by the declaration of the person so tendering his vote, if required by any voter on the register.² The form of the declaration prescribed by Schedule (A) of the Municipal Elections Amendment (Scotland) Act, 1868, is substituted for the oaths prescribed by the Act 3 and 4 Will. IV., cap. 76, section 8, and schedules (D) and (E) thereto annexed; and by the Act 3 and 4 Will. IV., cap. 77, section 4, and schedules (A) and (B) thereto annexed. When an elector, or person professing to be an elector, who claims to vote, is required by any other elector on the register to make the declaration, it should be proposed by the presiding officer in the precise words of the statute; and if made, the vote of the declarant must be received, unless indeed in the very special case hereafter alluded to, of a personator applying for a ballot paper in the name of an elector who has not voted. If, after being so required, any voter refuses to take the declaration, his vote cannot be received.

The declaration, it may be observed, is not that the person who claims to vote is rightly named or designed in the register as A. B., but that he is the person whom the name A. B. was intended to describe. If, therefore, William Buchanan were erroneously entered in the register as Andrew Buchanan, he could properly make the declara-

counted in favour of one of the candidates." [L. T. (N. S.) vol. xxviii. p. 111.]

See also Nos. 68 and 76 of these Observations.

¹ See rules 27 and 30 of schedule First of the Ballot Act.

² See the Acts 3 and 4 Will. IV., c. 76, section 8, and 3 and 4 Will. IV., cap. 77, section 4, as modified by "The Municipal Elections Amendment (Scotland) Act, 1868," section 8.

tion, and his vote should be received;¹ whilst any other person, though named Andrew Buchanan, who made the declaration, would be guilty of an offence.

The act of 1868 only requires the declaration to be made; it does not require the declaration to be signed or authenticated in any way; but it is desirable to preserve evidence of the fact that the declaration has been made, and therefore, in every case in which it is admin-

¹ In the Oldham Borough election case, tried by Mr. Justice Blackburn on 16th March 1869, the following points were decided:— (1) A house was stated in the register to be occupied by William Brown. In reality it was occupied by Thomas Brown, but he was seldom at home, and the rent and taxes were always paid by his wife. His son, William Brown, lived with him, but had nothing to do with the taking of the house, and was in no way responsible for the rates. Thomas Brown, finding he had been by mistake entered on the register as William, voted under that name. This was held to be no case of personation, but merely a misnomer, and the vote was sustained. (2) William Horsfall, the only man of the name of Horsfall in the town, voted in the name of Henry Horsfall. This was held to be a misnomer, and the vote was sustained. (3) A person, whose real name was Bradshaw, had been entered on the register as William Mills; he appeared in the rate-books for 1867 and 1868 as William Mills, but in the rate-book of 1869 he appeared under his own name of Bradshaw. Mr. Justice Blackburn observed:—"If the person on the register was called by a wrong name, that does not vitiate the vote. It certainly creates a little difficulty in the identity, but it does not annul the vote if he was the occupier of the premises, and the man who was intended to be described." The vote was held to be good. (4) William Warburton, described in the register as of 29 Moorhey Street, proved that he lived at 29 Gartside Street, and had lived in the same house for five years. The house had formerly, along with some others, been called Pleasant View; and Warburton was rated on the rate-book for Pleasant View. It was proved that Pleasant View was in Moorhey Street, but that in November 1868 the name was altered to Gartside Street. Mr. Justice Blackburn said that this was a mere case of misdescription. The material question in these cases was not whether the description was strictly accurate or not, but whether the voter was the man who was intended to be on the register. (5) When there are two persons of the same name resident in one house, *e.g.* a father and son, and one of them is enrolled as an elector, the real owner of the qualification is the only one entitled to vote. [O'M. & H. Reports, vol. i. pp. 152, 153, 154.]

istered, it should be signed by the person by whom it is made, and by the presiding officer. If the person making the declaration cannot write, or alleges that he cannot write, the presiding officer, applying the principle recognised by the Ballot Act as respects the declaration of inability to read, should require the person to affix his mark to the declaration, and afterwards certify the fact.¹

The sections of the Acts 3 and 4 Will. IV., caps. 76 and 77, which empower any elector on the register to require the declaration to be made by any person claiming to vote, are not repealed by the Ballot Act. Such requisition implies the presence of an elector to make it, and may to that extent conflict with rule 21 of the Ballot Act, which directs the presiding officer to exclude from the polling station all persons except the clerks, agents, constables, and persons engaged in voting. It has already been seen, however, that the exceptions in rule 21 must be extended to the effect of admitting the candidates themselves;² and it appears to the writer that it must still further be extended so as to preserve the rights of electors to enter the polling station and require the declaration to be put. The frequent exercise of the right by electors from the outside would be attended with much inconvenience, but may be almost wholly obviated by arrangements with the candidates or their agents, under which they, if present and registered electors, might ask the declaration to be administered to particular electors. But in every case in which the presiding officer admits an elector into the polling station for such a purpose, he should see that the elector does not remain there after the declaration has been made.

69. If a voter inadvertently deals with his ballot paper in such a manner that it cannot be conveniently used as a ballot paper, he may, on delivering the paper so inadvertently dealt with to the presiding officer, and proving the

¹ See form of certificate. Appendix XVI., No. 16, p. [208].

² See subsection (6) of No. 52 of these Observations, and footnote thereto.

fact of the inadvertence to the satisfaction of the presiding officer, obtain another ballot paper in place of the one so delivered up. The new ballot paper should be taken from the book of ballot papers in the ordinary course,—the number of the elector on the register being marked on the counterfoil as if he were getting a paper for the first time. But before the new paper is marked with the official mark and handed to the elector, the ballot paper delivered up should be cancelled by writing the word “spoilt” across its face and upon its counterfoil; and a reference should be made on that counterfoil to the number of the new ballot paper issued. The spoilt votes should be kept secret, and the spoilt ballot papers must be carefully preserved and accounted for, with the other ballot papers, in “The Ballot Paper Account.”¹

70. The presiding officer may do, by the clerks appointed to assist him, any act which he is required or authorised to do by the Ballot Act at a polling station, except ordering the arrest, exclusion, or ejection from the polling station of any person.² If any person misconducts himself³ in the polling station, or fails to obey the lawful orders of the presiding officer,⁴ he may immediately, by order of the presiding officer,

¹ See rules 28 and 30 of schedule First of the Ballot Act.

² The presiding officer will not be responsible for the acts of commission or omission of the clerk in the performance of the duties so delegated, inasmuch as he does not appoint the clerk, and the relation of master and servant does not exist between them. [Pickering *v.* James, 10th June 1873, L. R. (C. P.), vol. viii. p. 489; L. T. vol. xxix. p. 210.]

See the observations of the Judges in the same case (quoted in the footnote to No. 74 of these Observations) as to the liability of poll clerks to be sued for the consequences of their negligence in performing the duties assigned to them by the presiding officer.

³ Under the term “misconduct” must be included not only riotous or disorderly behaviour, but also such violations of the provisions of the Ballot Act as amount to crimes and offences. See Nos. 72 and 76 of these Observations.

⁴ Such, *e. g.*, as for a person, who enters a polling station for the purpose of voting, refusing or delaying to intimate his name to the presiding officer or clerks, or to take and mark a ballot paper, and

be removed from the polling station by any constable in or near that station, or any other person authorised in writing by the returning officer to remove him; and the person so removed shall not, unless with the permission of the presiding officer, again be allowed to enter the polling station during the day. Any person so removed, if charged with the commission in the polling station of any offence, may be kept in custody until he can be brought before a justice of the peace. But these powers must not be exercised so as to prevent any elector, who is otherwise entitled to vote at any polling station, from having an opportunity of voting there.¹

71. The Ballot Act enacts that "for the purpose of the adjournment of the poll, and of every other enactment relating to the poll, a presiding officer shall have the power by law belonging to a deputy returning officer."² What effect, if any, that provision has in relation to municipal elections in Scotland must now be considered.

None of the Municipal Election Acts contains any provision as to adjourning or closing the poll, in the case

thereafter to deposit it, or to leave the station after he has voted, or otherwise to obstruct or delay the taking of the poll.

¹ See section 9 and rule 50 of schedule First of the Ballot Act.

The phraseology of the last paragraph of section 9 of the Ballot Act has given rise to various questions as to what should be the action of the presiding officer under various circumstances in which he may find it necessary to exercise the power of removal and arrestment. It appears to the writer that nothing more can reasonably be deduced from it than this, that where any offender is entitled to vote, his offence shall not deprive him of an opportunity of voting. Accordingly, before any person who has not voted is removed, he should be distinctly informed that if he desires to vote he may do so, and he should be afforded the means of doing so. If he refuses or delays to avail himself of the opportunity so given, the provisions of the act would appear to be satisfied, and the presiding officer relieved of all obligation to admit him to the polling station afterwards.

The provisions of section 9 apply to candidates equally with other persons misconducting themselves in the polling station.

² See section 10 of the Ballot Act.

of riot or open violence, corresponding to that of section 32 of 2 and 3 Will. IV. cap. 65, or of section 5 of 5 and 6 Will. IV. cap. 78, or of section 9 of 16 Vict. cap. 28. But section 5 of 5 and 6 Will. IV. cap. 78, which relates to parliamentary elections in burghs, provides that "where the proceedings at any election shall be interrupted or obstructed by any riot or open violence, whether such proceedings shall consist of the nomination of candidates or of the taking of the poll, the sheriff or his substitute at the place where the riot or open violence has occurred may adjourn the nomination or the taking of the poll at the particular polling place or places at which such riot or open violence shall have happened to the following day or some other convenient time, and, if necessary, may repeat such adjournment till such interruption or obstruction shall have ceased, he always giving notice to the sheriff or his substitute, who is to make the return of such adjournment having been made; and the state of the poll shall not be finally declared, nor the result of the election proclaimed, until the poll so interrupted or obstructed shall be closed and transmitted to the sheriff or his substitute who is to make the return." And the Ballot Act, as has been seen, appoints *the poll* at contested municipal elections to be conducted, as far as circumstances admit, in the manner in which *the poll* at contested parliamentary elections is by that act directed to be conducted. Can it be held, then, that the change in the "manner of taking the poll," which it was the object of the Act to effect, extends to the conferring of power upon the returning officer or presiding officer, which he did not previously possess by statute, in the event of riot or open violence? Having regard to the *dicta* of the Lord President in the case of *Hamilton v. The Police Commissioners of Dunoon*,¹ it seems difficult to do so. Moreover, the term "deputy returning officer," employed in the provision of section 10 of the Ballot

¹ 15th January 1875, Session Cases (Fourth series), vol. ii. pp. 309 310. See footnote to No. 157 of these Observations.

Act above quoted, does not occur in any of the Scotch Election Acts. It may, therefore, be questioned whether the provision applies at all to Scotch elections; but even if it does, and if the term must be held to mean the sheriff-substitute, it would appear that the effect of the provision is simply to give the presiding officer the power of adjournment which the sheriff or his substitute or the returning officer possesses by law. That power, as regards the sheriff or his substitute, in parliamentary elections under the statutes above referred to, is express. It is not so as regards the returning officer in municipal elections; and if he has it at all, it must be at common law. It appears to the writer, however, that if the riot and violence were such as to affect the freedom of election, by depriving the electors of the liberty of going to the poll, and giving their votes without obstruction and without fear or intimidation, the returning officer would be warranted in closing the poll. Before doing so it would be his duty to use personal remonstrance with the rioters, and to employ all the police force and other means at his command to restore order. But if, notwithstanding his best efforts, rioting and violence still continued to such an extent as to prevent persons of ordinary nerve and courage from going to the poll and recording their votes, it would be useless to proceed further with the poll. Such a degree of general riot and violence, it has been held by the English and Irish Judges,¹ would vitiate an election; and

¹ See the *dicta* of Mr. Baron Martin in the Salford Borough election case, tried before him on 2d March 1869 [O'M. and H. Reports, vol. i. pp. 140, 141], and in the Nottingham Borough Election case, tried before him on the 29th July 1869 [*Ibid.* vol. i. p. 246]. See also the *dicta* of Mr. Justice Blackburn in the Staleybridge Borough election case, 13th February 1869 [*Ibid.* vol. i. p. 72], and in the Stafford Borough election case, 4th May 1869 [*Ibid.* vol. i. p. 234]; of Mr. Justice Keoch in the Drogheda Borough election case, 15th January 1869 [*Ibid.* vol. i. p. 254]; of Mr. Justice Fitzgerald in the Longford County election case, 28th March 1870 [*Ibid.* vol. ii. p. 12]; and of Mr. Justice Grove in the Dudley Borough election case, 28th April 1874 [*Ibid.* vol. ii. p. 121].

if this be so, it may be assumed that in such circumstances the poll might legally and with propriety be closed. Assuming this view to be correct, the presiding officer might, in the absence of the returning officer, adopt the same course; but in every case, before so acting, he should represent the facts to the returning officer, with a view to his personal attendance and direction. As the municipal election acts do not contain any statutory power of adjournment, while they do enact that no poll shall be kept open for more than a day,¹ it appears to the writer that the poll should be simply closed, and that the provost or chief or senior magistrate should, in terms of section 9 of The Municipal Elections Amendment (Scotland) Act, 1868, which provides for vacancies not being supplied by reason of the requisite number of councillors not being elected, from any cause whatsoever, in any burgh or ward, order a new election, as in the case of a double return, or of a person declining to accept office as a councillor.²

Any presiding officer, and any clerk appointed by the returning officer to attend at the polling station, may administer the declaration which every person claiming to vote may be required to take.³ None of the municipal election statutes in Scotland authorises any questions to be put to persons claiming to vote, such as may be asked in England at parliamentary elections. In all elections, of course, such questions as may be requisite to enable the presiding officer or clerks to ascertain who the claimant is, or to connect him with the entry in the register, are admissible and proper.

72. Every person who—

(1.) Forges or counterfeits or fraudulently defaces

¹ 3 and 4 Will. IV. cap. 76, section 9; and 3 and 4 Will. IV. cap. 77, section 6.

² 3 and 4 Will. IV. cap. 76, section 10.

³ See section 10 of the Ballot Act, and section 8 of "The Municipal Elections Amendment (Scotland) Act, 1868." See also No. 68 of these Observations.

- or fraudulently destroys any ballot paper or the official mark on any ballot paper ; or
- (2.) Without due authority supplies any ballot paper to any person;¹ or
 - (3.) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in ;² or
 - (4.) Fraudulently takes out of the polling station any ballot paper ;³ or
 - (5.) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election ;⁴

¹ The presiding officer, and the clerks appointed to assist him, are the only persons who can lawfully supply a ballot paper to a voter. Any other person doing so will commit a crime and an offence under the Ballot Act. But the offence may also be committed by the presiding officer and clerks. If, for example, they were to give out ballot papers to persons who were not registered electors, for a fraudulent or unlawful purpose, it can scarcely be doubted that they would incur the penalties prescribed by this provision of the statute.

² This would subject to punishment any elector who (1) introduced into a ballot box a paper other than that which he had received from the presiding officer, with a view to taking his ballot paper outside of the booth and using it for the manufacture of spurious ballot papers, or other unlawful purpose ; or (2) introduced spurious ballot papers into the ballot box along with the paper he had received from the presiding officer. It is equally directed against presiding officers and clerks placing in the ballot box fictitious and unauthorised ballot papers.

³ If one of the papers bearing the official mark be got out of the polling station, a series of substitutions may be made, each voter taking in a ballot paper already filled up, bearing the official mark, and bringing out the one given to him. Thus the secrecy of the ballot would be infringed. Besides, the removal of ballot papers from the polling booth would open the door to fraud by the manufacture of spurious ballot papers, and the subsequent surreptitious introduction of them into the ballot box.

⁴ After the ballot box has been locked and sealed up as described in No. 58 of these Observations, it must not be removed except by the presiding officer at the close of the poll, for the purpose of being delivered to the returning officer ; nor

will be guilty of a crime and offence, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour; and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour. Any attempt to commit any offence above specified is punishable in the manner in which the offence itself is punishable.¹

73. Every officer, clerk, and agent in attendance at a polling station must maintain and aid in maintaining the secrecy of the voting in such station, and must not communicate to any person before the poll is closed, except for some purpose authorised by law,² any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark.³ No

must it be opened, or otherwise interfered with, except by the returning officer or his assistants, for the purpose of counting the votes. No person, except the presiding officer or the clerks appointed to assist him, can lawfully interfere with the packets of ballot papers in use for the election. Contravention of any of these provisions is a crime and an offence.

¹ See sections 3 and 16, sub-section (1) of the Ballot Act.

² If, after a person has voted, a second application is made for a voting paper in the same name or number, the fact of the previous vote having been given must be communicated, in order to establish the offence of personation. The exception in the Ballot Act stated in the text meets such a case.

³ This provision of the Ballot Act, as was observed by Mr. Justice Brett, "is plainly pointed not only to secrecy as to the way in which an elector has voted (secrecy as to that is to be maintained for ever), but it requires secrecy, until the poll is closed, as to the names not only of those who have voted, but of those who have not offered to vote. The intention as to these last must be to prevent pressure being put upon those electors who do not wish to vote. The persons toward whom this secrecy should, it would seem, be most observed, are the candidate and his canvassing agents. This part of the section does not name or of itself include the candidate." [Clementson v. Mason, 25th February 1875, L. R. (C. P.) vol. x. p. 209.]

Every candidate has equal facilities with an agent for obtain-

such officer, clerk, or agent, and no person whosoever, must interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has

ing and communicating the information which presiding officers, clerks, and agents in attendance are here prohibited from disclosing. This prohibition, therefore, should have been extended to candidates. Moreover, every person who receives a ballot paper sees what is the official mark, and if the non-communication of information as to it was necessary, the prohibition should have been directed against voters also.

When a candidate, or the agent of any candidate, or other person who may be in a polling booth, is acting in such a way as to induce the presiding officer to suspect that he is communicating to persons outside information as to voters who have voted, or otherwise contravening the oath of secrecy, it will be proper for him to warn the person so acting of the serious personal consequences which violation of the provisions of the Ballot Act in this respect involves. Such violations of the Act, however, will not void the election, if, in the judgment of the Court, the result of the election was not thereby affected. In the Borough of Bolton election case, tried before Mr. Justice Mellor on 22d May 1874, it was proved that the personation agents of one of the candidates were furnished with a register of the voters, to which tickets were attached opposite the name of each voter, and that as soon as a voter had voted, the agent stealthily tore off the ticket and put it in his pocket, and subsequently conveyed it to some person outside the polling station, and by this means persons outside knew, while the poll was going on, who had voted and who had not voted. The returning officer communicated with the principal agent of the candidate, who immediately wrote each of the personation agents requesting them to desist; but, notwithstanding, some of them did not desist, and the returning officer reported the matter to the Home Secretary. In these circumstances it was pleaded by the other candidate that the election ought to be declared void. The Judge, however, while expressing his opinion that the agents who had so acted had committed a violation of their statutory declaration of secrecy, and an offence within the meaning of the Ballot Act, thereby rendering themselves liable to serious punishment, held such liability to be the only protection which the Legislature has provided. "The punishment," he added, "is specified by the Legislature; it must be found within the four corners of the Act of Parliament; and I have no power, neither has the common law any power, to supplement any additional penalty upon either the persons who transgressed the law, or the persons for whose sake or in whose favour such an act may have been done." In support of that view, he quoted and concurred in a statement made by Mr. Justice Martin in his evidence before the Select Committee on Elections on 29th June 1869, when, describing what would be the result of a breach of the law, Mr. Justice Martin was asked by Sir George

voted,¹ or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote

Gray, "Do you mean that if it was proved that a candidate had committed acts which were illegal, and which subjected him to penalties, the Judge could take no notice of it, unless it was an act which vacates the seat?" In answer he said, "I think certainly that the mere doing of an act which the Act means to be subject to a penalty, but does not declare to affect the seat, could not by possibility affect the seat." The question there had reference to a "candidate," but Mr. Justice Mellor observed that the same principle must apply to an agent, assuming that the act done was one of those things which came within the general law of agency. [O'Malley and Hardcastle's Reports of Decisions on Election Petitions, vol. ii. p. 138. In the case of Woodward v. Sarsons, 9th July 1875, the Court of Common Pleas in England expressed their approval of the answer of Baron Martin and of the decision of Mr. Justice Mellor, both above referred to. L. T. vol. xxxii. p. 867-873.]

In the case of Hamilton v. The Police Commissioners of Dunoon, 15th January 1875, one of the grounds of objection to the validity of the election of commissioners in October 1873 was, that the secrecy of the ballot had been infringed by the presiding officer announcing from time to time the numbers who had voted. Such announcement, it was said, assuming the ballot papers to be consecutively numbered, would have enabled an expert note-taker to ascertain the relative numbers on the counterfoil, and so afterwards to identify any voting paper. It was proved in evidence, however, that the numbers who had voted were only mentioned to officials all sworn to secrecy, and when no others were present, and it was not shown that a single vote was known to anybody but the voter himself. The Lord Ordinary (Gifford), on 27th October 1874, disallowed the objection and sustained the election. The First Division of the Court, on 15th January 1875, also sustained the election, without pronouncing any opinion on the objections taken as to the irregularities committed by the returning officer, which it was held could not be entertained under the conclusions of the summons. [Court of Session Cases (Fourth Series), vol. ii. p. 299; The Scottish Law Reporter, vol. xii. p. 257.] See footnote to No. 61 of these Observations.

¹ The interference here prohibited is interference with a voter in the polling booth, and for the purpose of obtaining information as to how he is to vote or has voted. The attempt to obtain such information otherwise must also be made within the booth, to bring it within the scope of the enactment. The prohibition seems to apply to the overlooking of a voter when marking his vote. It is the duty of every clerk and agent in attendance, "in maintaining the secrecy of the voting," to call the attention of the presiding officer to any such contraventions of the statute, and the presiding officer will, if necessary, cause the offender to be removed from the booth and report the offence to the returning officer.

or has voted,¹ or as to the number on the back of the ballot paper given to any voter at such station. No person shall directly or indirectly induce any voter to display his ballot paper after he has marked the same, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.² Every person who acts in contravention of these requirements of the Ballot Act will be liable, on summary conviction, to imprisonment for any term not exceeding six months, with or without hard labour.³

74. Every returning officer, presiding officer, and clerk, who is guilty of any wilful misfeasance or any wilful act or omission in contravention of the Ballot Act will, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding

¹ The communication of information as to a candidate for whom the voter has *not* voted, is not here prohibited. Such information would, however, be a manifest violation of the spirit of the Act, and reprehensible if not dangerous.

² No one may directly or indirectly *induce* a voter to display his ballot paper after he has marked it, so as to show for whom he has voted, without being liable to punishment. But the voter is not prohibited from showing his marked ballot paper. In other words, punishment is prescribed for inducing to do an act the doing of which is not even prohibited. What, moreover, constitutes indirect inducement? Would denunciation of the principle of the ballot, or open exhibition by a voter of his own ballot paper, as an example and encouragement to other electors to do the same thing, be so regarded?

This provision of the Ballot Act applies to candidates as well as to all other persons who may be present in the polling stations.

³ This last provision, according to Mr. Justice Brett, may include a candidate, and does include him if, under the middle part of section 4, or by reason of being admitted under other sections to a polling station, or to the place of counting the votes, he is enabled to contravene, and does contravene, the secrecy enjoined by this section. [Clementson v. Mason, 25th February 1875. L. R. (C. P.) vol. x. p. 209.]

See sections 4 and 16, sub-section (2) of the Ballot Act.

one hundred pounds.¹ This penal sum, it will be observed, is declared to be in addition to any other penalty or liability to which the person committing the wilful misfeasance, or wilful act of omission, may be subject.² There is thus no room for the contention, that the only liability which can arise for breach of the duty imposed by the act is the penalty prescribed by it. For the non-performance or improper fulfilment of ministerial duties, *i.e.* duties of a plain, positive, and unmistakable kind, which do not involve the exercise of discretion and judgment, action will lie at the instance of one who has sustained special and particular damage; and in such action it is not necessary to aver that the omission was wilful or malicious.³ The rule is different when duties are of a

¹ See section 11 of the Ballot Act. This provision, it will be observed, does not extend to candidates.

² See 3 and 4 Will IV. cap. 76, section 34; 3 and 4 Will. IV. cap. 77, section 32. See also No. 100 of these Observations.

³ *Earl of Kinnoull v. Ferguson*, 5th March 1841, 3 D. 778; 16 F. 841; *Aff.*, 11th July 1842; 1 Bell, 662. In that case, in which the members of a presbytery who had refused to take a presentee to a church upon trial were held liable in damages, Lord Chancellor Lyndhurst thus stated the rule of law as applicable to questions of this kind:—"When a person has important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages, by way of compensation for the injury that he has so sustained. . . . This is not the rule in England alone; it is a general rule applicable also to Scotland. It is as much the law of Scotland as the law of England. . . . It is a general universal principle. . . . What is the argument of the appellants in this case? It is said that this was the decision of a Court; . . . that they were acting judicially; and that, acting judicially, therefore, if they committed an error, no action can be maintained against them. My Lords, I do not deny that principle as a general principle; and if they had admitted that gentleman upon trial, and after taking him upon trial had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it. But, my Lords, that does not apply to the present case. Here they had no discretion to exercise; they had to form

judicial or *quasi-judicial* character. In such cases error in the performance of them will not found action for damages,

no judgment; they were bound by the law to do the act; they could appeal to no tribunal. It was imperative upon them to accept the party upon his trial; it was their public duty. It bears no analogy, no resemblance, to a judicial decision; and I apprehend that, under such circumstances, it is quite clear that this action can be supported."

Pickering v. James, 10th June 1873. L. R. (C. P.) vol. viii. p. 489; L. T. vol. xxix. p. 210. In that case a presiding officer, at a Birmingham municipal election, having omitted to stamp with the official mark nine ballot papers in favour of a candidate who was defeated by a majority of three, it was held that the presiding officer, having undertaken and entered upon a ministerial duty, and having failed to perform it, an action lay against him for damages at the instance of the candidate aggrieved, without averring that the omission was wilful or malicious. The following extracts from the opinions of the Judges in that case are instructive as to the relative duties and liabilities of presiding officers and polling clerks:—

CHIEF-JUSTICE BOVILL.—"I am of opinion, looking to the provisions of the act, that there is clearly a duty cast on some person to deliver to the voters ballot papers with the official mark properly stamped upon them. It is provided that an instrument shall be procured for the purpose of stamping them; and there must be some one to use it. Some stress was laid on the provision that the mark was to be kept secret, and it will be as well to deal with this point at once. It is to be secret in the sense that no opportunity is to be given for imitating it; but it cannot be intended to be so secret as that the voter may not know and recognise it. It does not follow from that that he would be able to carry it away or copy it for the purposes of forgery. The mark being placed on both sides of the paper, the voter, on being handed the paper, will necessarily be able to see what it is; and the act and the directions to the voter expressly direct that the voter shall show the mark on the back to the presiding officer before placing the paper in the box. Now, the act providing that the paper shall be delivered to the voter at the polling station, having the official mark, and that the voter shall fill up the paper in a particular manner, and before depositing it in the box shall show the mark on the back, who is the person that is to see that these directions are carried out? The presiding officer is the person who is to preserve order, and generally to attend to what is necessary at the polling station. There may be various officers provided according to the act. In small districts, perhaps, the presiding officer alone will suffice; but in populous districts it would be impossible for the presiding officer by himself to do all that is necessary at an election. Provision is made for the appointment of clerks, and, as a general rule, one would expect that in such districts there would be several clerks to attend to the various practical details, to refer to the register, fill up the counterfoils, stamp the papers, &c., and that the presiding officer would exercise a general supervision, and

unless malice be averred and shown. Malice may, however, be inferred from the conduct of the officer.¹

¹ [See *Drew v. Coulton*, cited in *Hannan v. Tappenden*, 1 East. 552. *Dawson v. Allardyce*, 18th February 1809, 15 F. C. 202. See also *Ashby v. White*, and other cases cited in *Smith's Leading Cases* (7 edition), vol. 1, pp. 251-284 ; 305-309.]

only interfere in cases of any difficulty or disturbance. Now, the duty must lie on some one to deliver the papers bearing the official mark. It appears to me that the question on whom it would lie depends on the question to whom it was in point of fact intrusted. The presiding officer might undertake it himself, or he might depute it to a clerk under the provisions of the 50th rule; but that one or other must do it seems to me clear. The conclusion at which I have arrived, after the able argument on the subject, is, that the duty of delivering the paper with the official mark upon it must rest with the person who undertakes that part of the duties connected with the election at the polling station; and I mean by that, not the person who generally undertakes that duty, but the person who in each particular instance undertakes it, and consequently that the responsibility would rest on the presiding officer or the clerk, according as the one or the other did in point of fact deliver out the paper. With reference to acts done by the clerk, the performance of which had been deputed to him by the presiding officer, it must be observed that the clerk is appointed and paid by the returning officer, not by the presiding officer; the relation of master and servant does not exist between the presiding officer and the clerk; each is an independent officer, though the powers of the presiding officer are larger. It seems to me, therefore, that the presiding officer is not responsible for the act of the clerk in delivering out a paper not marked with the official mark. The clerk would be the person on whom the responsibility would devolve, by reason of his having undertaken the duty *quoad* the particular voter. If, on the other hand, the presiding officer undertook the duty by himself, delivering the paper to the particular voter, he would be bound to see that the paper was duly stamped. The question of responsibility must, as it seems to me, depend on the question who personally delivered the paper. The next question is, how far the presiding officer was bound to be present at the polling station, so that each voter, before placing his ballot paper in the box, might show the official mark on the back to the presiding officer, in accordance with the statute. It is obvious that there must be some one bound to be present for the purpose, if the Act is to be complied with. It appears to me that the duty may rest on the presiding officer himself, or, in large and populous districts, where there might be great pressure during certain hours, as at meal hours in a working-class constituency, and it would be impossible practically for one man to attend to all that was necessary, this also, in my opinion, is one of the things which would seem to be within the 50th rule, and which might be deputed to clerks. In practice I have little doubt that in populous places that is the course adopted. The presiding officer would hand the voting papers to different clerks, probably assigning to each clerk a particular portion of the alphabet, and the clerks would hand them out to the voters, and when the voters had filled them up, they would require

75. Whether a returning officer may vote in the election in which he is officially engaged, is a question on which

to place them in the ballot box before the clerk, and the voter would then exhibit the mark on the back of the paper to the clerk presiding over the ballot box in which he deposited it. I see no objection to that course, and I do not see how the matter could be managed otherwise in practice. Then, the same rule appears to apply to this duty as to the duty first alleged. The duty would seem to rest on the person who undertakes to perform it in the particular case. * * * *

“It was urged, with respect to the first and second counts, that the 11th section showed that they were not sustainable, and that the only liability which could arise for a breach of the duties alleged was the liability to a penalty under that section. It appears to me that this argument is not well founded, because the section provides that the penalty shall be in addition to any other liability. If there be these duties of delivering papers marked with the official mark and of being present that the voter may show the mark, then for the breach of them there would, apart from the 11th section, be a liability in addition to that provided for by the 11th section, and consequently by the very terms of that section it is not affected.

“It was also urged, with respect to the first and second counts, that no action would lie for the breach of the duties alleged in them, even if such duties existed, unless the acts complained of were done maliciously or negligently. If there be a positive duty, as contended for, as I think there is with respect to two of the matters alleged, it is a ministerial duty, and it is not necessary that there should be malice or negligence. It would be superfluous to go through the cases on the subject. It is a general rule of law that, when a ministerial duty is imposed, an action lies for breach of it, without malice or negligence.”

JUSTICE KEATING.—“This is an action against a presiding officer at a municipal election for the borough of Birmingham, in respect of certain breaches of duty alleged against him as such presiding officer. The breaches charged are, (first), that he delivered ballot papers to voters which had not upon them the official mark; (secondly), that he did not ascertain that the voting papers were stamped upon the voters depositing them in the ballot box; and (thirdly), that he was not present at the polling station, so that the voters could show him the official mark on the ballot paper before placing it in the box. The first question is, whether the statute creates any duty on the part of the presiding officer the breach of which would render him liable to an action such as is now sought to be maintained. It has been very forcibly contended by Mr. Holl that it was not intended by the statute to create any duty on the part of the defendant, or, as I understood Mr. Holl, and indeed it is a necessary consequence of his argument, on the part of any person, to perform the matters specified in the act, so as to create any liability to an action for breach of such duty. It seems to me that the statute does most clearly create a duty in some person to perform the acts thereby specified; and it would be a strange result if we were driven to such a construction of the act as would render its provisions nugatory, and to say that the performance of all these duties, which are obviously more or less important and essential to the working of the act, are left to the discretion of the parties employed to perform them. It is clear to me that the

difference of opinion exists. In parliamentary elections, when an equality of votes is found to exist between any

act imposes a duty on some one. What then are the acts which by the statute are required to be performed? The scheme of the act is, to introduce a system of secret voting. The voter is to apply for a balloting paper, and that paper is to be delivered to him, his number on the register being first ascertained, and the paper being marked on both sides with the official mark. It is obviously most important that the paper which is delivered out to the voter should be the same which he afterwards deposits in the box. Accordingly, the officer is required to stamp the paper on delivering it to the voter, and the voter, after going into the compartment and marking the paper secretly, is to fold up the paper, leaving the official mark on the back exposed, and, taking it in that state, is to show the mark on the back to the officer, and deposit the paper in the box. The defendant occupied the position of presiding officer. The presiding officer is appointed by the returning officer, and his duty is to preside at the polling station, and to keep the ballot-box in his view. It is clear that by the act the returning officer can appoint such assistants as are necessary for the presiding officer in the shape of clerks, and that the presiding officer may delegate so much of his duties as he thinks fit to such clerks, with certain exceptions as to the maintenance of order. It might be doubtful, also, how far he could delegate the duty of presiding generally at the polling station, for that duty appears peculiarly appropriated to himself in person. These duties, then, appear to me to be clearly imposed on some one, and in my opinion *prima facie* they are imposed on the presiding officer. I am by no means disposed to think that, if the presiding officer delegated the duty of delivering the voting papers to the clerk, as I think he might, and the clerk in fact delivered the papers without marks, and the presiding officer had not personally anything to do with such delivery, the presiding officer would be liable for it. I think, on the contrary, that the clerk would in that case be responsible. It is sufficient for the present purpose to say that the presiding officer is *prima facie* the party liable. If he seeks to get rid of such liability, it is upon him to show that he has delegated his duty to a clerk. I am therefore of opinion that *prima facie* the first duty alleged in the declaration is cast on the defendant.

"Then, these duties being imposed by the statute, are there here such breaches of them as to subject the defendant to an action? It appears to me that these duties are purely ministerial, and therefore that this case is within the class of cases in which it has been held that, there being a breach of duty purely ministerial, an action will lie without any allegation of malice. It has been contended that the 11th section shows the intention to have been, that the only remedy for a breach of duty should be by way of penalty. It seems to me clear that the remedy given by that section is merely cumulative, and it leaves any right of action at common law untouched."

JUSTICE BRETT.—"With respect to the construction of the Act, the first question is, whether its provisions are merely directory, and are mere instructions, which the parties concerned may follow or not with impunity, or whether they impose a positive duty on some one. It seems to me that they impose imperative duties, because they give rules of conduct to be observed by persons who are to be paid for the observ-

candidates, and when the addition of a vote would entitle any of such candidates to be declared duly elected,

ance of them, and likewise because they are clearly provisions expressly provided by the legislature because they were considered to be the only means of protecting the public interest.

“It seems to me, looking to the scheme of the act, that it would be frittering away its effect, and making it useless for the very purpose for which it was passed, if we did not hold that its intention was that some person who is presiding should deliver the papers, stamped with the official marks, to the voters, and be present for the purpose of seeing, and should actually see, that the paper brought back has such official mark on the back, and that it, and no other, is deposited in the box; and that the provisions for securing these objects are imperative, and not merely directory, on persons who have undertaken to carry them out for reward. Then comes the question, On whom is the duty cast? It seems to me that *prima facie* it is cast on the presiding officer; and that *prima facie* he undertakes it, when he accepts the office, by such acceptance. By the 50th rule he has the power of delegating such portions of his duty as he may think fit to a clerk if appointed; but all such parts of his duty as he may not so delegate he is bound to perform himself. If he delegates a portion of his duty, he is not, as it seems to me, liable in respect of acts done by the clerk with reference to the portion of his duty so delegated, and in which he does not interfere, because the clerk is not his servant; he does not appoint him, and has not the power of choosing him with reference to his competency. He is only responsible in respect of such duties as he keeps in his own hands; but, *prima facie*, he undertakes all.

“The next question is, Whether the duties imposed by the act are such as to give a right of action against him personally for breaches of them by individuals, if personally aggrieved, without any allegation of malice or wilfulness? I think they are, because they are ministerial duties merely, and the general rule of law is, that a breach of such duties gives a right of action to the party aggrieved thereby.

“The cases of *Schinotti v. Bumsted* (6 T. R., 646); *Tozer v. Child* (7 E. and B., 377; 26 L. J. (Q. B.) 151); and *Atkinson v. Newcastle, &c., Waterworks Co.* (Law Rep. 6 Ex. 404), are authorities to that effect. But it is said that the terms of the 11th section of the act take the case out of the general law. It may be noticed, in passing, that the 11th section assumes that not only the presiding officer, but a clerk, is responsible for the performance of the duties imposed by the act. I think, if it were not for the words reserving other remedies, it is possible that the section might bring the case within *Couch v. Steel* (3 E. and B., 402; 23 L. J. (Q. B.) 121), though I doubt it. But there are words which expressly state that the penalty is to be in addition to any other liability. Then, if there be any other liability by the general law, that is preserved.”

JUSTICE GROVE.—“I agree with my Lord that two out of the three of the allegations of duty contained in the declaration are good, viz., that of the duty to deliver to the voters voting papers marked with the official mark, and that of being present for the purpose mentioned in the second count. The act appears to me to cast these duties on the

the returning officer, if a registered elector, is authorised by section 2 of the Ballot Act to give such additional vote; but in no other case is he entitled to vote at an election for which he is returning officer. This provision is, however, declared by sub-section 7 (a) of section 20 of the Ballot Act not to be applicable to municipal elections, and as the acts regulating these contain no

presiding officer for the time being. I say for the time being, because no doubt a clerk may be appointed, and may be representing the presiding officer at the particular time in question, and in some cases the returning officer may elect to perform the duty himself. . . .

“With regard to the two allegations of duty I first referred to, it seems to me that though there is no section which expressly imposes them on the presiding officer, yet, by necessary implication, it is clear that he is to perform them. With regard to the first, viz. that of delivering the papers marked with the official mark, some person must do it, and who that person is to be not being expressly pointed out, we must look to the general scheme of the act to find out. . . .

“It seems to follow that this officer is bound to undertake the duty unless the returning officer appoint a clerk to assist, which it is clear, from rule 48, he may do; and then, if the duty be delegated to the clerk, he is, for the purposes of the particular function, delegated the presiding officer, as it were, for the time being.

“If the provisions of the Act are to be carried into effect at all, it must be that either the presiding officer or the clerk must be responsible for the performance of those duties which are obviously essential; for without papers properly marked with the official mark the voters cannot vote at all, or, at any rate, not effectually. With regard to the duty alleged in the second count, viz. that of being present in order that the voter may show the official mark on the ballot-paper, it is only necessary to look at the 2d section, which provides that the voter is to place the paper in the box in the presence of the presiding officer, to show that it is his duty to be present. The 9th and 10th sections, and the 20th, 23d, and 28th rules in the schedule, and the directions to the voters, all likewise show by implication that it is his duty. . . .

“The question then arises, whether for breaches of the duties imposed by the statute an action will lie; and I am entirely satisfied by the authorities that have been referred to, that where the duty is purely ministerial, as I think these duties are, an action will lie at the suit of a party aggrieved by a breach of it, without any allegation of malice. With respect to the argument raised upon the 11th section, I should have doubted, even without the words which expressly provide that the remedy there given shall be in addition to other remedies, whether the effect of this section, applying only to wilful breaches of duty, could have been by implication to take away the remedies which there otherwise would have been for breaches of duty that are not wilful; but those words seem to me to make it quite clear that the argument is unfounded.”

[L. R. (C. P.) vol. viii. p. 489; L. T. vol. xxix. p. 210.]

See also *Ashby v. White*, and other cases cited in *Smith's Leading Cases* (7th edition), vol. 1, p. 251-284; 305-309. *Addison on the Law of Torts* (4th edition), p. 28.

prohibition against a returning officer voting as an ordinary elector, there seems little room for doubt that when he is a registered elector he is entitled to vote, though not to give a casting vote.¹ But looking to the position he occupies, and the duties he has to discharge, it appears to the writer that he ought to abstain from voting. A similar course should also be followed by the presiding officers and clerks.

76. For all purposes of the laws relating to municipal elections, a person will be deemed to be guilty of the offence of personation who at a municipal election applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person,² or who, having voted once at any such election, applies at the same election for a ballot paper in his own name. The offence of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, is by the

¹ In October 1872 the Town Council of Lauder consulted Mr. A. R. Clark, then Solicitor-General, and now Dean of Faculty, and Mr. Watson, now Solicitor-General, as to whether the chief magistrate was entitled to vote in an election of councillors in which he was to act both as returning officer and presiding officer, and they received the following opinion:—"In our opinion the effect of sub sec. 7 (a) of sec. 20 of the Ballot Act is to leave the right of the returning officer at municipal elections to a personal vote on the same footing as before the passing of the Act. Such being the case, it follows that, in our view, he is entitled to vote, but not to give a casting vote in case of equality of votes." (*Vide* 3 and 4 Will. IV., c. 76, sections 10 and 11.)

It may be observed that, when consulted in 1873 as to school board elections in burghs, Mr. Clark, then Solicitor General, and now Dean of Faculty, held that the nature of the duties of the returning officer precluded him from voting, though neither the Education (Scotland) Act nor the Ballot Act contain any express prohibition to that effect. These duties are so analogous to those of a returning officer in municipal elections that it is obviously safer and more prudent to adopt the course recommended in the text.

² But see Nos. 59 and 68 of these Observations, and footnote 1, p. 90.

Ballot Act declared to be a crime and an offence, and the rules of the law of Scotland with respect to apprehension, detention, precognition, commitment, and bail are applicable thereto, and any person accused thereof may be brought to trial in the Court of Justiciary, whether in Edinburgh or on circuit, at the instance of the Lord Advocate, or before the sheriff-court at the instance of the procurator fiscal. Any person convicted of personation may be punished by imprisonment for a term not exceeding two years, together with hard labour. It is the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, at the election for which he is returning officer.¹

Whether in the event of a person applying for a ballot paper in the name of some other person, or for a second ballot paper in his own name after he has once voted, the presiding officer would be warranted, if he knew the applicant to be guilty of personation, to prevent him from actually voting by causing his immediate arrest, is a question on which difference of opinion exists. The offence of personation is completed by the application for a ballot paper in either of the two cases above referred to;² an application for a ballot paper is, moreover, declared by the Ballot Act to be "equivalent to voting"³ in the enactments of the several parliamentary election acts, and personation is declared to be a crime and offence in Scotland. Further, the presiding officer is empowered to order the immediate removal from the station, by any constable in or near the station, of any

¹ See sections 24 and 26 of the Ballot Act. See No. 67 of these Observations.

² The Ballot Act, section 24, and No. 76 of these Observations.

³ Ibid., section 25.

person who misconducts himself in it; and the person so removed, "if charged with the commission in such station of any offence," may be kept in custody until he can be brought before a justice of the peace—provided that the power of removal so conferred shall not be exercised so as to prevent an elector, "who is otherwise entitled to vote," from having an opportunity of doing so.¹ Having regard to these enactments, it seems to the writer that personation, being a crime and offence, is "misconduct," which warrants the removal of the offender, and detention till he is brought before a justice. It is difficult, moreover, to conceive that a personator can be "otherwise entitled to vote." It must, however, be kept in view that the Ballot Act contains express provision for the case of a person, representing himself to be a particular elector, applying for a ballot paper after another has voted as such elector. In such a case the presiding officer, after the applicant has taken the declaration prescribed by statute,² must give him a tendered ballot paper and receive his vote as a tendered vote.³ No discretion seems to be conferred upon the presiding officer in such circumstances,⁴ and the proper course seems to be to call the attention of the returning officer specially to the facts with a view to his instituting a prosecution against the personator. The delay in that case will do no harm, inasmuch as the tendered vote will not be counted if the vote previously given is good. The result is different when a person, not the registered elector, applies for a ballot paper before the true elector has voted. The vote of the personator in these circumstances will be counted in the first instance, to the exclusion of the really good vote, and the effect may be to secure the temporary return of

¹ The Ballot Act, section 9, and No. 70 of these Observations.

² See No. 68 of these Observations.

³ See No. 67 of these Observations.

⁴ See also No. 68 of these Observations.

the candidate who has the fewest real votes, entitling him to act till his election has been voided by a legal process at once expensive and productive of delay. Such a result can scarcely have been contemplated by the legislature; and if the writer, as a presiding officer or returning officer, were absolutely satisfied that an applicant for a ballot paper in the name of an elector who had not voted was a personator, he would take upon himself the responsibility of ordering his exclusion or arrest, and so of preventing him from voting. It will be seen, however, that the evidence of personation must be very clear to warrant such a course.

77. The Acts 3 and 4 William IV., c. 76, and 3 and 4 Will. IV., cap. 77,¹ require the poll to be closed at four o'clock, and these provisions are not altered by the Ballot Act. The alteration in the mode of voting, however, has given rise to questions as to whether a voter, who happens to be in a polling place when four o'clock arrives, is entitled thereafter to receive a ballot paper and to mark and deposit his vote; or whether, if the voter has received a ballot paper previous to four o'clock, he is thereafter entitled to mark and deposit it? Upon these questions Mr. A. R. Clark, then Solicitor-General, and now Dean of Faculty, and Mr. Watson, now Solicitor-General, were consulted in 1872, and after full consideration, they expressed the opinion that a voter who happens to be in a polling station when four o'clock arrives is not entitled to receive a ballot paper after that hour. But if, previous to four o'clock, he has received a ballot paper, and has not unduly delayed to mark and deposit it, he may after four o'clock mark and deposit it.²

¹ See sections 9 and 6 respectively.

² See section 9 of the Act 3 and 4 Will. IV., c. 76; and section 15 of the Ballot Act.

See also Memorial and Opinion, Appendix XVI., pp. [176], [187].

A committee of Sheriffs, appointed to consider the Ballot Act and arrange as to the procedure in parliamentary elections, has, however, adopted a different view, and held that every voter duly admitted to the polling station previous to four o'clock is entitled to receive a ballot paper, and having received it, to mark and deposit it in the ballot box after four o'clock, if there be no undue delay.

This difference in opinion and practice is to be regretted; but the writer is prepared to adhere to the opinion of the learned counsel who were consulted as above stated, till a different rule has been laid down either by the legislature or by judicial authority. In declaring that the poll shall close at four, the legislature has made no distinction between electors inside and those outside of the polling booth at that hour. If an elector happens to be within the booth, but has not received a ballot paper when four o'clock arrives, his removal from the booth enables the poll to be immediately closed so far as he is concerned, and the provisions of the act to be complied with. But when he has got a ballot paper the process of voting has commenced; and in order to satisfy the requirements of the Ballot Act, the ballot paper, which has been detached from the counterfoil and stamped, must be accounted for and disposed of. This can only be done by depositing it in the ballot box, or by returning it as spoilt, which it is not. On the whole, therefore, the simplest and most satisfactory method, and the one most consistent with the spirit of the act, seems to be to allow the vote to be marked and deposited.

What the effect would be of opening and closing the poll in a municipal election at hours other than those specified in the Acts of Parliament, does not appear to have been decided in Scotland. In one case the Lord Ordinary (Robertson) and the Judges of the Second Division of the Court of Session seem to have indicated an opinion that an objection, competently stated, to a municipal election, on the ground of the poll having

been unduly opened and closed, would, if established, be sufficient to nullify the election.¹ The question has been raised as regards parliamentary elections both in England and Ireland,² and the decisions in these

¹ Blair v. Steele and Others, 1st June 1848; 10 D. 1095; 20 Jur. 402.

² In the Limerick Election case, 14th May 1833, the Sheriff had failed to keep open the poll for the number of hours in each day required by law. But after due deliberation, the committee sustained the election on the ground that the result had not been affected by the irregularities. They reported "that the proceedings of the Sheriffs in opening and closing the poll at hours other than those prescribed [by the then existing statutes] were highly improper, but the committee had reason to believe that their conduct did not arise from any corrupt motive; and further, that the result of the election was not affected by such proceedings." [Perry and Knapp, 356.] The principle of this case is thus illustrated by Mr. Warren. "Suppose a constituency of a thousand voters, with two candidates for a single seat, one of whom has polled nine hundred and ninety votes, and the other eight; leaving only two unpolled voters; how could the result of the election have been affected by non-observance of any provision of a merely directory character? It is to be borne in mind, however, in dealing with the case here proposed, and indeed with every one alleged to have "affected *the result of the election*," that it cannot be *ascertained* what acts or omissions have been attended with such consequences, till after an investigation by a select committee. It may then turn out, for instance, that if the sitting member who had polled nine hundred and ninety-nine votes out of the thousand, and his opponent only the one remaining vote—and even that may have been his own "recorded for himself"—still every one of these nine hundred and ninety-nine votes may be afterwards properly struck off by a committee as invalid, through having been "thrown away" on a disqualified candidate, or otherwise; while the solitary vote of the petitioner, whether his own or that of another voter, remaining unimpeached, entitles him to the seat. If, therefore, by any improper means, that one vote had been prevented from being given, it would as effectually have 'affected the result of the election,' as though by the same means ten thousand votes had been prevented from being recorded. This consideration tends to invest with great importance every step taken during an election, and proportionally augments the personal responsibility of those taking it." [Law and Practice of Election Committees, pp. 383-384.]

In the second Harwich Election case, 11th July 1851, the com-

cases seem to have been determined by the consideration whether the irregularity was of such a serious and substantial kind as to warrant the reasonable belief that it affected the result of the election.

mittee decided that there had been a premature closing of the poll (though only to the extent of three or four minutes); that the proceedings had been interrupted and obstructed by violence; that in consequence of such interruption and obstruction by open violence an elector had tendered his vote, but had been prevented from recording the same; that the returning officer should not have finally closed the poll; and finally, that the election was void. [Power, Rodwell, & Dew's Reports, vol. i. p. 314.]

In the Hackney Election case, tried before Mr. Justice Grove on 15th and 16th April 1874, it was proved that in one district of the borough, containing 4838 voters and two polling stations, the stations were closed during the whole day of the election, so that none of the 4838 voters could record their votes. At four other stations voters were prepared to record their votes during a certain period of the day of election, but were unable to do so owing to the polling stations being closed. Upwards of 5000 voters were thus prevented from recording their votes. The judge held—(1) that two of the principles of the Ballot Act being that the voting at an election should be secret, and that all voters should have an opportunity of recording their votes, it was impossible to enquire how the voters who were unable to vote would have voted, and consequently that it was impossible to say positively that the irregularities complained of had or had not affected the result of the election; but the conclusion from the facts was, that the irregularities had such a bearing upon the result as to affect the election within the meaning of the act. (2) That an election is not conducted in accordance with the principles laid down in the Ballot Act, if any considerable proportion of a constituency are prevented from recording their votes, or have impediments placed in their way calculated to prevent them from voting. He accordingly declared the election to be void. [O'M. & H. Reports, vol. ii. p. 85; L. T. (N. S.) vol. xxxi. p. 69.]

In the Drogheda Election case, tried before Mr Justice Barry on 29th May 1874, it was proved that, in consequence of some unforeseen accident, the polling stations were not opened at 8 a.m., and that no voters were or could be received until 8.45. The judge, however, declined to void the election in consequence of the irregularity, observing as follows:—"Being satisfied, as I am, that this fact had not the remotest effect upon the result of the election; being satisfied that the constituency was polled out, so to speak, in a manner, if not unusual, at least remarkable; being satisfied

The same principle would probably be applied in Scotland now to municipal as well as parliamentary elections.¹

78. As soon as practicable after the close of the poll, the presiding officer must, in the presence of such of the candidates or agents as may be present, make up into *separate* packets, sealed with his own seal, and the seals of such of the agents as desire to affix their seals:—²

that no single voter was disappointed in voting, or was induced or caused to vote differently from what he otherwise would have done, by reason of this error of time, I will not declare the election invalid by reason of the irregularity that the booths were not opened, strictly speaking, at eight o'clock. I think the cases referred to by the petitioners [Limerick, P. & K. 373; Harwich, 1 P. R. & D. 314; and Hackney, O'M. & H. ii. p. 77] stand each upon a very different footing. I think that the closing of the booths an hour or two before the proper time is a very different question. At all events, it does appear to me that in all these cases the element of common sense and the reason of the thing has largely to enter into the consideration of the tribunal." Subsequently in his final judgment he added as follows:—"I have seen a suggestion that my decision in this case is a dissent on my part from the decision of Mr. Justice Grove in the Hackney case. I beg leave to disclaim any such dissent. There is no resemblance between the two cases. In that case the most ordinary and necessary rules of an election were violated. . . . But in the case now before me, it was not proved, it was not even suggested, that a single voter had been disappointed in voting by reason of the delay. . . . To hold an election void under such circumstances as the present would be to put it in the power of any careless or corrupt presiding officer in any one polling station to nullify the solemn act of the largest constituency in the Kingdom. [O'M. and H. Reports, vol. ii. p. 201-203.]

See also the judgment of the Court of Common Pleas in England in the case of *Woodward v. Sarsons*, 9th July 1875, printed partially in footnote pp. 186-191, and partially in footnote pp. 136-139.

If the poll were improperly prolonged, the state of the poll at the time when it should have been closed would probably determine whether the election would be sustained or voided (*Arundel, Glanvill*, 71). In the *Knaresborough Election* case, 21st April 1853, it was alleged that the poll had been kept open and votes received after the legal time, but no decision was given as to the effect of this upon the election. [2 Power, Rodwell, & Dew's Reports, 211.]

¹ See the *Greenock Election* case, 9th February 1869. [O'M. and H. Reports, vol. i. p. 247].

² See rule 29 of schedule First of the Ballot Act, and footnote to No. 96 of these Observations.

- (1.) The ballot box, unopened, but with the key attached, the aperture on the top being closed and sealed up so as to prevent the introduction of additional ballot papers. To each ballot box a label should be attached, having inscribed upon it the name of the ward and the number of the polling station at which it was used.
- (2.) The unused and spoilt ballot papers placed together. At the close of the poll the stitching of the ballot book in use must be cut, so as to admit of all the unused ballot papers, with their counterfoils, being removed from the counterfoils of the used ballot papers. These unused ballot papers and counterfoils, with any books of ballot papers which have not been begun to be used when the poll is closed, must then be sealed up with the spoilt ballot papers, leaving merely the counterfoils of the used and the counterfoils of the spoilt ballot papers to be sealed up together, as directed in sub-section (5) below.
- (3.) The tendered ballot papers.
- (4.) The marked copies of the register of voters.
- (5.) The counterfoils of the ballot papers.¹
- (6.) The tendered votes list, and the list of votes marked by the presiding officer, and a statement of the

¹ Rule 29 of schedule First of the Ballot Act directs the counterfoils to be included in the same packet with the marked copies of the register of voters. But to do so would necessitate the violation of the provision either of rule 41 or of rule 42. The former, read in connection with rule 64, sub-section (a), and rule 65, prohibits the packet of counterfoils from being opened, except by order of the Sheriff Court having jurisdiction in the burgh, or any part thereof, or of any tribunal having cognizance of election petitions; while the latter, read in connection with rule 64, sub-section (b), and rule 65, declares that all documents, other than ballot papers and counterfoils, shall be open to public inspection, and requires the town clerk to supply copies of or extracts from them to any person demanding the same.

The propriety of the course recommended in the text has been

number of the voters whose votes are so marked by the presiding officer under the heads "*Physical Incapacity*," and "*Unable to Read*," and the declarations of inability to read.¹

Each packet should have inscribed upon it a memorandum of the polling place and polling station whence it has come, and the contents of the packet; and all the packets should be delivered by the presiding officer personally to the returning officer or his agent as soon as possible after four o'clock, at such place as may be appointed for the counting of the votes.² The packets must be accompanied by a statement by the presiding officer of the number of ballot papers entrusted to him, and accounting for them under the heads of ballot papers in the ballot box, ballot papers unused and spoilt, and tendered ballot papers. This statement, which should

confirmed by Mr. Justice Brett in *Stowe v. Joliffe*, 18th April 1874. He observed as follows:—"According to my view of rule 29, the numbers are put merely to denote divisions of the subjects, and not to denote what is to be put in one packet. When the legislature intended to require two or more things to be placed in one sealed packet, they say so. If this matter had been strictly and properly conducted, I think the marked register would have been in a sealed packet by itself. Somehow or other it has found its way into the same packet with the counterfoils. But by rule 41 the court may make an order for the opening of the sealed packet of counterfoils; and I think we ought to facilitate the petitioner by ordering the packet to be opened, subject to the conditions I have mentioned, the marked register being taken out, and to be open to inspection." Mr. Justice Grove and Mr. Justice Denman concurred in the packet being opened, and the marked register being inspected. [L. R. (C. P.) vol. ix. pp. 454, 455; L. T. vol. xxx. (N. S.) p. 303.]

In the case of *James v. Henderson*, 8th May 1874, the Court of Common Pleas in England followed the precedent of *Stowe v. Joliffe*, and ordered the marked register of votes to be exhibited to the agent of the petitioner. [L. T. (C. P.), vol. xxx. p. 527.]

See No. 104 of these Observations.

¹ See No. 65 of these Observations, and footnote No. 3 thereto, p. 86.

² See rule 29 of schedule First of the Ballot Act.

be prepared with care and accuracy, should be put in a separate envelope, having the words "Ballot Paper Account" endorsed upon it. The stamping instrument should also be sent with the packets to the returning officer.¹ Strict adherence to all these regulations is of great consequence, and the presiding officer who fails to give minute compliance with them, entails upon the returning officer much additional labour, besides exposing himself to personal responsibilities.²

(6.) *Counting the Votes.*

79. The manner in which municipal elections were conducted by open poll, both in burghs which are not divided into wards and in burghs which are so divided, has been described in No. 31 of these Observations.

¹ See section 2 and rule 30 of schedule First of the Ballot Act.

In the Birmingham Municipal Election of 1874, the presiding officer at one of the polling stations did not make out any ballot-paper account or statement. Objection to the election of the councillor for the ward was stated, *inter alia*, on the ground of non-compliance with the direction in Rule 30 of schedule First. The Court of Common Pleas in England, however, overruled the objection and sustained the election. [Woodward v. Sarsons, &c., 9th July 1875. L. T., vol. xxxii. (N. S.) pp. 867-873. L. R. (C. P.) vol. x. pp. 733-751.]

² In the case of Hamilton v. the Police Commissioners of Dunoon, 15th January 1875, it was objected to the validity of the election of Commissioners in October 1873, that the returning officer, who also acted as presiding officer, did not make up into separate packets and seal the several papers, books, and lists specified in rule 29 of schedule First of the Ballot Act, as required by that rule, with his own seal, nor did he make up any ballot-paper account as directed by rule 30. The Lord Ordinary (Gifford) held, on 27th October 1874, that none of these objections "affect the validity of the election as a whole," and he sustained the election. The First Division of the Court, on 15th January 1875, also sustained the election, without pronouncing any opinion on the objections taken as to the irregularities committed by the returning officer, which it was held could not be entertained under the conclusions of the summons. [Session Cases (Fourth Series), vol. ii. p. 299.] See footnote 1 to Observation No. 61, p. 84.

But the Ballot Act, as has been seen, alters the previous law in so far as relates to the taking of the poll in contested municipal elections, while it otherwise assimilates the manner of conducting municipal elections in all burghs, by enacting that they shall be conducted in the same manner in every respect in which elections of councillors in the royal burghs specified in schedule (C) of the Act 3 and 4 William IV., c. 76, are directed to be conducted by the acts in force at the time of the passing of the Ballot Act. The question now arises,—To what extent do the provisions of the Ballot Act in regard to the counting of the votes, and the time of counting, and the declaration of the poll, apply to municipal elections?

The taking of the poll and the counting of the votes are distinct operations, and are so treated in the Ballot Act. The former, it may be said, is completed when the poll is closed, and the several documents are sealed up and delivered by the presiding officer to the returning officer. The latter commences when the returning officer proceeds, with his assistants and clerks, in the presence of such of the candidates or agents as are in attendance at the time and place previously intimated to them, to do what is necessary in connection with the counting. The Act 3 and 4 Will. IV., cap. 76,¹ as has been seen,² directed the poll-books for the several wards to be sealed up at the close of the poll by the persons who presided at the several polling places, and transmitted to the provost, or chief or senior magistrate, who, on the next lawful day after the receipt of the same, was directed, between the hours of twelve and two, and within the town house or other public building of the burgh, to openly break the seals, and with the assistance of the town-clerk and such other persons as he might think fit to employ, cast up the votes given, and declare upon whom the election had fallen by the majority of votes. This provision, in so far

¹ Section 10.

² No. 31 of these Observations.

as it relates to poll-books, is expressly repealed by the Fifth schedule of the Ballot Act; but the necessity for counting the votes, and declaring on whom the election has fallen, remains, and cannot be held to be repealed, except in so far as may be inconsistent with the Ballot Act, under the provisions of section 32 of that statute. The primary object of that act, however, is to secure secrecy in voting, and it is clear that the counting of the votes, and every other proceeding relative to the custody, inspection, and scrutiny of the papers connected with the election, must be conducted in conformity with the provisions of the statute, in so far as designed to secure secrecy. To that extent, therefore, the provisions of 3 and 4 Will. IV., cap. 76, must be held to be controlled by the Ballot Act.

On this subject Mr. A. R. Clark, then Solicitor-General, now Dean of Faculty, and Mr Watson, now Solicitor-General, were consulted in 1872, and they recommended a course of action which gave effect, as far as possible, to the provisions of both acts. "We think," they say, "that at the close of the poll the provost or other returning officer may proceed at once to examine the ballot papers and count the votes. The poll ought not, in our opinion, to be declared until between the hours of twelve and two o'clock on the day following the election. If the examination and casting up of the votes cannot be concluded before two o'clock, the poll ought to be declared as soon as possible after these operations are completed."¹

Giving effect to the opinion thus expressed, the proceedings connected with the counting of the votes may be summarised as follows:—

80. Before the election the returning officer should determine the number of assistants and clerks whom he may consider it necessary to employ, and complete the necessary appointments. All the persons so appointed

¹ See Memorial and Opinion, Appendix XV., pp. [167], [169], and [185].

must take the declaration of secrecy, in the presence of the returning officer or of a justice of the peace, before the commencement of the poll.¹ There is nothing to prevent persons, who have acted as presiding officers and clerks in taking the poll, from acting as assistants or clerks at the counting of the votes. But the qualification required for a presiding officer is not needed for an assistant, and the fee of the latter must not exceed two guineas per day.²

81. As the returning officer cannot proceed with the counting of the votes between seven o'clock at night and nine o'clock in the morning without the consent of the candidates or their agents, he should, before the day of election, obtain their consent to make such arrangements as he may consider best fitted to expedite the counting. This should be done by a written minute signed by the candidates or their agents.³ He should also arrange as to the number of agents who are to attend at the counting of the votes on behalf of the several candidates, and these agents must take the declaration of secrecy before the poll commences.⁴

82. If the office of the returning officer does not afford the required accommodation for counting the votes, a suitable place should be secured and fitted up for the purpose, giving ample room for those to be engaged in the work. A space should also be marked off to receive

¹ See rules 48 and 54 of schedule First of the Ballot Act; form of appointment of assistants and clerks, Appendix XVI., No. 2, p. [22]; and sub-division (12) of No. 46 of these Observations.

² See section 16, sub-division (5), of the Ballot Act.

³ See form of minute, Appendix XVI., N. 23, p. [213].

⁴ See rule 54 of schedule First of the Ballot Act, and No. 52 of these Observations.

The Select Committee of the House of Commons on Parliamentary and Municipal Elections, recommend that the counting agents should be authorised to "take the declaration of secrecy, not as at present, necessarily before the opening of the poll, but at any time before the commencement of the counting."—Report, p. vi.

the ballot box and papers of each presiding officer as they arrive, so as to prevent confusion and the intermixture of papers. While provision must be made for the candidates or the agents of candidates, care must be taken to prevent them having access to the ballot papers, or mixing or interfering in any way with those engaged in counting the votes.

83. On the day previous to that on which it may be resolved to proceed with the counting of the votes, a written notice should be sent to each of the candidates, or to each of the agents of such of the candidates as may have appointed agents, intimating the time and place at which the counting of the votes is to be proceeded with.¹ Such notice may either be delivered at, or sent by post to, the address of the candidate or his agent. The counting may proceed either on the evening of the day of election, or the morning of the succeeding day.² But in no case, as has been stated in No. 79 of these Observations, should the official declaration of the poll be made till between twelve and two o'clock on the day following the election, if the counting of the votes can be completed before that time. The non-attendance of the candidates or their agents at the counting of the votes will not affect the validity of the operation, if due notice has been given to them of the time at which the counting is to proceed.³

84. On receiving from each presiding officer the several packets described in No. 78 of these Observations, the returning officer must examine the seals and satisfy himself that they are entire. Each ballot box and set of papers should thereafter be immediately deposited in the place marked off to receive them, as suggested in No. 82 of these Observations.

¹ See form of notice, Appendix XVI., No. 24, p. [213].

² See rule 52 of schedule First of the Ballot Act.

³ See section 2 and rules 32 and 55 of schedule First of the Ballot Act.

85. No person except the returning officer, his assistants and clerks, and the candidates¹ or agents of the candidates, may be present at the counting of the votes, except with the leave of the returning officer; and it is desirable to limit as much as possible the number of persons who are to be present.² In counting the votes given, let it be supposed in the first ward, only the candidates or agents for the candidates in the first ward must be admitted; and before proceeding to count the votes in the second ward, the candidates or agents for candidates in the first ward must retire, and those for the second ward be admitted.³ When arrangements can be made for simultaneously counting in one room or hall the votes given in two or more wards, the candidates or agents for the candidates in each of these wards must of course be admitted, but only to the part of the room or hall at which the counting of the votes for the ward in which they are respectively interested is being proceeded with.

86. The first thing to be attended to at the meeting is to ascertain (1) that notice has been given, in terms of the Ballot Act, to the candidates or to the agents of the candidates of the time and place at which the provost or chief magistrate is to proceed with the counting; and (2) that all the agents and other persons present, excepting candidates, have taken the declaration of secrecy.

87. The envelope containing the ballot paper account applicable to each polling station will then be opened. No other packet should be opened at this stage. Thereafter the returning officer will open each ballot box used at the election for the particular ward, and, taking out the

¹ See rule 51 of schedule First of the Ballot Act.

See also No. 52, sub-section (6) of these Observations, and relative footnote, p. 76.

² It is obvious that this sanction ought not to be given, except for the purpose of assisting the returning officer in the counting.

... Home Office and Lord Advocate's Abstract, art. 41.

³ See rule 33 of schedule First of the Ballot Act.

papers therein, count and record the number thereof.¹ The ballot papers should be arranged in bundles, each containing twenty-five. When the whole ballot papers in each box have been counted, the number will be compared with that stated in the ballot-paper account. Any discrepancy will render it necessary to re-examine and re-count the several bundles. Nothing must be done as regards subsequent operations till any mistake is discovered and rectified. Great inconvenience is often occasioned by the carelessness of presiding officers in preparing the ballot-paper account, and not unfrequently no ballot-paper account is furnished by presiding officers to the returning officer. In such cases the returning officer has no alternative but to proceed without it, minuting the omission.

88. After the number of ballot papers in each box has been reconciled with the number in the ballot-paper account, or, in cases where there is no ballot-paper account, has been carefully ascertained, the whole of the ballot papers contained in the several ballot boxes used at the election for each ward must be mixed together, with a view to the counting of the votes being proceeded with.²

89. Rule 34 of schedule First of the Ballot Act directs the returning officer, while counting and recording the number of ballot papers and counting the votes, to keep the ballot papers with their faces upwards, and to take proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. This direction, however, must be read in connection with, and must be construed so as to give effect to, the positive enactment of section 2 of the Act, referred to in the immediately following Observation, which imposes on the returning officer the duty of examining the back of each ballot paper, in order to see that the requirements of the

¹ See rule 34 of schedule First of the Ballot Act.

² See footnote 2 to Observation No. 91.

statute are not contravened. All that he can do would appear to be to prevent as far as possible the numbers on the backs from being seen so as to be noted by the candidates or agents who may be present.¹

90. In counting the votes, the returning officer must necessarily reject such ballot papers as are unmarked or void for uncertainty,² and is specially required by the Ballot Act to reject and not count any ballot paper—

- (1.) Which has not on its back the official mark;³
- (2.) On which votes are given to more candidates than the voter is entitled to vote for;³ and
- (3.) On which anything except the number on the back is written or marked by which the voter can be identified.³

On these three several statutory grounds for rejecting ballot papers, a few observations may be made.

(1.) *The absence of the official mark.*—Every elector receives only one ballot paper from the presiding officer, who is required before delivering it to the elector to mark the paper on both sides with the official mark. The voter is also required, after he has marked his vote, and before he deposits his ballot paper in the ballot box, to show the official mark on the back of the paper to the presiding officer. The mark is thus a check upon the introduction into the ballot box of unauthorised or fictitious ballot papers, and the want of the mark enables such papers as may have been surreptitiously introduced to be detected and rejected at the counting of the votes.

The returning officer has no option but to reject all the ballot papers wanting the official mark, even when it is obvious and admitted that the presiding officer has

¹ See rule 34 of schedule First of the Ballot Act.

See footnote 2 to Observation No. 91.

² See rule 36 of schedule First of the Ballot Act.

³ See section 2 of the Ballot Act; and rule 36 of schedule First of that Act.

been in fault.¹ The agreement of all the candidates or their agents to waive objection and to accept the result of the vote as ascertained by the returning officer without reference to the want of the official mark, will not warrant him in departing from the express provision of the statute. Such agreement could bind no one who was not a party to it, and all the electors in each ward are interested in the election.

Whether the omission to mark ballot papers with the official mark, and the consequent rejection of votes on that ground, would invalidate the election, would depend upon whether the result of the election could be reasonably supposed to have been affected by such omission.

(2.) *The voting for more candidates than the elector is entitled to vote for.*—If an elector is entitled to vote for only one candidate, and nevertheless votes for two, or if, being entitled to vote for two candidates, he nevertheless votes for three, he makes it impossible to determine which one of the two candidates, or which two of the three candidates he prefers.

(3.) *Any writing or mark by which the voter may be identified.*

¹ In the case of *Pickering v. Startin* (Birmingham Municipal Election) ten votes were rejected, on the ground that the ballot papers used in giving them did not bear the official mark. [*Pickering v. James*, 5, 9, and 11th June 1873. L. T. (N. S.) vol. xxix. p. 211.]

In the *Wigtown Election* case (*Haswell v. Stewart*), tried before Lord Ormidale on 6th April 1874, two ballot papers were objected to as not bearing the official mark, and the objection was sustained, the judge observing :—"I have no alternative but to hold that they ought not to have been counted, and that they must now be rejected. I apprehend that there must have been an omission, in the hurry of the proceedings, to apply the official mark. No doubt this is a hardship upon the voter in one sense, but in the 'directions as to voting,' which were put up in conspicuous places at the polling booths, reference is made to the official mark, and the voter has a particular duty to perform in reference to it; that is to say, he must fold up the ballot paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is upon his voting paper." [O'M. and H. Reports, vol. ii. p. 216.]

—If a voter adhibits his signature to the ballot paper, or writes his name on it, he violates the secrecy which the act enjoins, and vitiates his vote. The same result may also be brought about by his writing to any extent on any part of the ballot paper,—for writing affords the means, through a *comparatio literarum*, of discovering the writer. What marks on the ballot paper may lead to the identification of the voter, and so necessitate the rejection of the ballot paper, it is impossible to define absolutely. The only mark which the Ballot Act authorises the voter to make is that which indicates his vote,¹ and the Form of Directions for the guidance of the voter in voting, contained in the Second schedule to the Act, prescribes the form of the mark, and the position it should occupy. It must be a cross thus X, placed on the right-hand side, opposite the name of each candidate for whom the elector votes. Any material deviation either from the prescribed form or position of the mark may, it has been held in Scotland, enable the voter to be identified, and so vitiate the vote. But it may often be difficult to draw the line of demarcation between deviations of a trivial or unimportant and those of a material kind. The one class may run imperceptibly into the other, and deviations may justify a rejection of votes under certain circumstances, indicative, it may be, of a preconcerted plan to identify certain classes of votes, which may be passed over in others where the deviation has obviously been accidental and indicates no premeditation or collusion. On this subject the judgments of the Second Division of the Court of Session, in the case of *Haswell and Jamieson v. Stewart* (Wigtown District of Burghs), 23d May 1874;² of the same

¹ Section 2 requires him to “mark his vote,” and rule 25 of schedule First requires him to “mark his paper,” without in either case specifying the form or position of the mark.

² Session Cases (Fourth Series), vol. i. p. 925. O.M. and H. Reports, vol. ii. p. 215. Appendix No. 3 to the Report of the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876), p. 124-129.

Division, with the addition of Lords Deas, Ardmillan, and Mure, in the case of *Robertson v. Brown and Others* (Musselburgh election), 5th July 1876;¹ and of the same Division alone in the latter case on the same day, with the opinions of the judges explanatory of these judgments, are instructive.

In the Wigtown case² objections to votes were sus-

¹ The Scottish Law Reporter, vol. xiii. pp. 630-636.

² The opinions of Lords Neaves, Ormidale, and Benholme, who formed the Second Division of the Court by which this case was tried, were as follows :—

LORD NEAVES.—The questions here raised are important and delicate ; on this account, in particular, that while a certain form of exercising the franchise is pointed out in the statute on the subject, some deviation from the strict letter of the directions therein contained may be so trifling as to be immaterial, while others may be so serious as to be fatal. The merits of each vote, therefore, may turn on questions of degree, which it is always difficult to distinguish, as the one class may run almost imperceptibly into the other. This is the old puzzle as to how many grains of corn make a heap, or at what stage a little thing grows into a big one.

In this state of matters, the important point is to look to the great objects and principles of the statute, and to take care that we do everything necessary to follow these out, and nothing that can defeat or endanger them.

The great object in view, I take it, in the Ballot Act, is the double result of facility in the exercise of the franchise, and secrecy as to the vote given by individual voters. This double purpose is by the Act sought to be accomplished by not allowing a vote to be given *viva voce*, as it used to be, nor in writing (properly speaking) ; in either of which cases secrecy would be impossible, or would be imperilled, for by writing, though not setting forth the writer's name, yet through the *comparatio literarum* the writer might be discovered ; nor would it have done to leave the voter to put any mark he pleased to show the candidate for whom he voted. A mark has been pointed out and represented in the statutory directions—that of a cross, thus, X. It is, I think, a mark well devised for the purpose, easy of execution by men of the most moderate intelligence, and at the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance. I think it scarcely possible that a ballot paper strictly in terms of the statute should lead to the voter's identification—one man's cross being in general undistinguishable from another man's. In these circumstances, I think it essential to a good vote that the voter should make the cross thus pointed out, and that any mark materially different would be a deviation from what is prescribed, and a failure to fulfil the requirements of the statute. For any one to put, instead of a cross, a circle or an oval, or any other geometrical or anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from

tained on the following grounds:—(1.) That instead of being marked with a single cross to the right of the candidate's name, the ballot paper was marked with two crosses, neither being in the proper place, but one diagonally below the name to the right, and the other diagonally below the name to the left; (2.) That the ballot paper was marked not with a cross at all, but

what was intended would suggest strongly the suspicion that some sinister purpose was in view.

In one of the votes before us, being, I think, No. 634, there is no cross, or attempt at a cross, but merely an oblique straight line. I think that the voter who made this mark has not exercised his franchise under the Ballot Act, and that his ballot paper ought not to have been counted.

On the other hand, there are ballot papers in which a cross is made, or attempted to be made, but is not very well made; whether from unsteadiness of hand or accidental disturbance, the cross lines are not clean or steady, but somewhat shaky and irregular. I am of opinion that such imperfections and defects are not fatal, and that it would be harsh and unjust to disfranchise a voter for such appearances. Neither am I inclined to punish with disfranchisement one voter here who has made a very respectable cross, but who has thought that it might not be the worse of small feet or claws to support it, and make it like a printed capital X. That seems to me an innocent idea, and at any rate not a sufficiently serious or suspicious addition to make his vote bad. I do not know whether this voter may not have been reading Johnson's Dictionary, and referring to a word which the Doctor is very fond of using,—the word "to decussate," which he explains as meaning to intersect at an acute angle; and he quotes some passages to show that decussation is done by lines having the form of the letter X decussating one another longways. Now, this voter has decussated these lines, and in doing so he has made very small feet or resting-places for them. I would not advise that system to be carried too far, but where it is done in the slight way that appears here, I would not hold that it operates a disfranchisement of the voter.

On the other hand, where there has been put on the ballot paper a substantive and separate addition to the voter's mark, this seems to me to be a good objection, and to be struck at expressly or virtually by one of the clauses of the 2d section of the Ballot Act, by which any ballot paper is declared void on which anything but the number on the back is written or marked "by which the voter can be identified." This clause is not expressed with the precision that would have been desirable, for it is not exactly clear upon the face of it what is the essence of the nullity or vice here indicated. But I think that under this enactment any plain and palpable addition on the ballot paper, unconnected with the actual mark of the vote, is a fatal objection. We have among these ballot papers one which has a black line drawn on the back, and others on which there is a plurality of crosses on the front, and it is a nice and important question whether these unnecessary things are merely super-

with a single stroke; (3.) That the ballot paper was not marked with a cross on the right of the candidate's name, and that the only mark on the paper was a mark, not a cross, to the left of and outwith the space for the candidate's name; (4.) That the ballot paper was not marked with a cross on the right of the candidate's name, but only with crosses or marks on the left of the name;

fluous and innocent, or whether they fall under the category of being marks by which the voter can be identified.

I think that this declaration of nullity does not require that there should be absolute proof of a design or intention on the part of the voter to be identified. That is not said, and it is not to be expected; and considering the secrecy of the proceedings, it cannot be supposed that either the returning officer or the election judge should be able to say what was the intention of the party or parties in thus adding to the statutory expression of his vote. But it is plain that such additional marks may be used as a means of communicating information such as might lead to identification; and where they are plainly done not by mere carelessness or want of skill, we are naturally led to ask, why are they there at all except for some sinister purpose? If we allow any superfluous additions of this kind, we may be obliged to pass them over, however numerous they may be, and thus a door would be open to evasion of the essentials of the act. If a voter puts the cross strictly in terms of the statute, there is scarcely a possibility of identification from the ballot papers; but if a voter, besides his proper cross, puts one or more additional crosses, or puts circles or ovals *ad libitum*, he raises a strong suspicion against his intentions, and has himself to blame if his ballot paper is rejected.

All such superfluities are the less excusable, as the act provides for the voter having a new ballot paper if one has been spoiled or rendered unfit or unsuitable for the purpose in the course of voting.

With regard to the position of the cross, it is directed to be put on the right-hand side, opposite the name of the candidate. I think some latitude must be allowed on this subject, and that if the mark is opposite the candidate's name and towards the right-hand side, the paper should be sustained; but not so if it is decidedly at the left-hand side, which seems a gross as well as a serious deviation from the statute.

I think it is not essential that the cross should be made with pencil. The directions, indeed, contain this paragraph, that the voter will take the pencil provided in the compartment and mark his vote; but this is not a substantive enactment, and is not expressed in imperative words. The 25th section of the First schedule says merely that he shall "mark his paper"; and the 20th section speaks of materials to be provided. The use of the "pencil" provided in the directions can scarcely be enforced. It would be impossible to enquire whether a mark was made by the pencil provided by the returning officer or by the pencil of the voter, and therefore it seems impossible to object to that. A good cross with any pencil, or with any ink not peculiar, seems unobjectionable, and not contrary to any purpose contemplated by the Act.

Besides, it is impossible to say whether the ink used here may not

(5.) That instead of being marked with a cross to the right of the candidate's name, the ballot paper was marked (a) with a cross and marks unconnected with the cross; (b) with a cross placed above and over the candidate's name; (6.) That two parallel strokes were drawn on the back of the voting paper, in the place, to the left of and over the candidate's name, corresponding

have been used by the presiding officer under some of the clauses of the statute which permit his interference.

Upon these principles, I have formed my opinion that certain of the votes here objected to should be sustained, and that to others—the votes disallowed—the objections should be sustained. It will be the duty of the election judge to follow out the findings which we may pronounce, and to apply them to the numerical question on which the result of the election depends.

LORD ORMIDALE.—I think it right to explain that, while I disposed of various points relating to the validity of ballot papers which were discussed before me as election judge in this petition, I considered it desirable to reserve for the determination of the Court the objections referred to in the special case now before us. I was induced to do so, as well by the difficult and perplexing nature, in some respects, of these objections, as by the obvious desirability of having, as far as practicable, some rules or principles established by the more authoritative judgment of the Court than that of a single judge, for the guidance of parties who may be concerned in future elections. This appeared to me to be all the more desirable as there is reason to believe that the opinions entertained and given effect to by the returning officers in the recent elections throughout the country were far from uniform.

The particular sections of the Ballot Act, upon the true construction of which the questions now to be determined chiefly depend, are referred to in the special case.

The great object of the act appears to be to prescribe such a mode of procedure as, while it would enable the electors to give their votes in a ready and simple form, will at the same time ensure that this is done with as much secrecy as is attainable in such a matter. Accordingly, in the second schedule to this act there is what is called "Form of directions for the guidance of the voter in voting"; and, among other things, it is there prescribed that "the voter will go into one of the compartments" (at the polling place), "and with the pencil provided in the compartment place a cross on the right-hand side, opposite the name of the candidate for whom he votes, thus X." And in the same schedule it is declared that if the voter places any mark on the paper by which "he may be afterwards identified, his ballot paper will be void, and will not be counted." Although these statutory provisions are in one of the schedules to the act, and not in the body of the act itself, and are under the title "Form of directions for the guidance of the voter in voting," it must be kept in view that by section 28 it is enacted that the schedules and directions therein "shall be construed and have effect as part of this act." Not only so, but to denote the imperative nature of the prohibition against the placing by a voter on a ballot paper anything

to the cross to the right; (7.) That the ballot paper was marked with an angular stroke opposite the cross to the right of the candidate's name; (8.) That the ballot paper was not marked with a cross to the right of the candidate's name, but with a cross to the left of and under the candidate's name. On the other hand, votes were sustained, though objected to on the following grounds:—

by which he may be identified, it is, by the second section of the Act itself, expressly enacted that any ballot paper "on which anything except the said number on its back" (the number previously mentioned in the same section) "is written or marked by which the voter can be identified, shall be void, and not counted."

What, then, are the objections to ballot papers now to be determined by the Court, and are they, or any of them, of a nature which must be held to be fatal to the votes? They are generally to the effect that the ballot papers contain marks or writings which are not only prohibited by the act, but are of such a description that the voter may or can be thereby identified.

Now, while it would be desirable that some precise and well-defined rules were established for the determination of all such questions in their various specialties and modifications, I do not see how this can be adequately done by the Court. I do not for myself see that I can do more in this direction than state that while, on the one hand, there must be a reasonable and substantial compliance with the provisions of the act, on the other hand, trivial or unimportant deviations, such as might not unfairly be held to be incidental to the performance of the piece of work in question by different individuals of different ages, habits, and conditions, ought to be disregarded, provided that the true object and intention of the voter is free from serious doubt, and that there is not sufficient ground for holding, in a fair and reasonable sense, that there is any mark or writing on the ballot paper whereby the voter can be identified. There is one thing, however, as to which I am clear, viz. that in order to show that any writing or mark on a ballot paper unauthorised by the statute is of a description whereby the voter can be identified, it is not necessary that an inquiry should first be gone into for establishing the identification, or for the purpose of showing that the voter had, by previous concert with others, intended to make it known for whom he voted. Not only does the statute not provide for or make any allusion to such an inquiry, but it is plain, I think, from the only interpretation that can be given to its provisions, that it is enough that the mark, if any, other than the authorised marks appearing on a ballot paper, is of a description whereby the voter might be identified.

Having regard, then, to these general considerations, it appears to me, after giving all due effect to the argument which was addressed to the Court, and after a personal examination of the ballot papers in dispute, that two crosses, neither of them being in the proper place; or a cross or crosses, or other mark or marks on the ballot papers to the left of the candidate's name; or in addition to a cross, a separate distinct stroke on the ballot paper to the right of the candidate's name; or instead of any cross at all, a mere stroke on the ballot paper, or two

(1.) That the ballot paper was not marked with a cross at the right hand of the candidate's name, and out-with the space for the candidate's name, but with a cross above the name; (2.) That the ballot paper was not marked with a cross on the right of the candidate's name, but with a cross below the name; (3.) That the ballot paper was not marked with the materials provided

parallel strokes on the back of the ballot paper, besides a cross on the front, cannot, in any reasonable sense, be held to be trivial or unimportant deviations from the statutory directions; but, on the contrary, must be held not only to amount to a substantial failure to comply with the statutory directions, but are also marks or writings of a description whereby the voter may or can be identified. And if so, it follows that the 13th section—or what may be called the saving clause of the act—is inapplicable; and indeed, I did not understand that that clause was contended to be, in the circumstances of the present case, of any material importance.

In reference to the ballot papers, Nos. 840 and 922, objected to by the petitioners on the ground that ink, and not a pencil, was used by the voter, and the voting paper, No. 814, objected to by the respondent on the same ground, I may explain that I do not see how these objections can be sustained, because the use of a pencil is not positively and directly enjoined by the statute, although some reason for holding it to be implied is afforded by the phraseology used in part of the First schedule to the act, and also because the only positive and direct enactment on the subject is that in section 20th, to the effect merely that “the returning officer shall provide each polling station with materials for the voters to mark the voting papers;” but what materials—whether pencils or pens and ink—are not specified. Besides, even if it were to be held that, having regard to what is said in the directions in the second schedule to the act as to a pencil, the using of ink is not allowable, and might afford means for identification, it would be necessary, I think, for a party taking such an objection to support it by proof, to the effect that the ballot papers referred to were not marked by the presiding officer for voters who were unable to do so for themselves, in terms of the 25th section of the act, which, neither expressly nor by implication, makes it requisite that in such cases a pencil, and not ink, must be used by the presiding officer.

LORD BENHOLME.—As my two brethren are agreed in regard to the disposal of the objections to the votes now before us, my opinion becomes of little consequence; but I confess I think they have gone too far in sustaining the objections. It appears to me that two of the votes are clearly objectionable. One of these falls under that part of the act which enacts that any ballot paper “on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void, and not counted.” Now, any mark on the back of a voting paper (by which it is patent to all and sundry) seems to me to be marked out as censurable, and as fatal to a very different extent from marks within the voting paper (and consequently concealed), that may be extraneous to the proper function of the voter. It is

by the returning officer, viz. blacklead pencils, but with ink.

After the Wigtown case had been decided, similar questions were raised in England, in the case of *Woodward v. Sarsons, &c.*, 9th July 1875. In the latter case, which referred to a disputed municipal election in Birmingham, the Court of Common Pleas had specially

declared that any mark upon the back is to be fatal. Thus, therefore, I think, we all agree that No. 468, which has two parallel strokes drawn on the back of the paper, cannot be sustained under the express words of the statute. That is a mark obvious to everybody, because the outside of the ballot paper is not concealed at all. That, I understand, is the only voting paper bearing any mark on the outside, except one with which we have nothing to do, but which the judge disallowed at the trial, there being a name written upon it.

With regard, however, to superfluous marks made on the inside in adhibiting the cross to the name of the candidate for whom the elector gives his vote, I think these stand in a different category. I quite agree with my brethren that in one case where there is no cross at all, but merely a line, the voter has completely failed to declare his choice. But, on the other hand, where a cross has been made, and where that cross is so placed as to leave no doubt for which candidate the voter intended to vote, I am not able to agree with the principle upon which my brethren have determined to reject several such voting papers. In the first place, I think it is not fatal that the cross is put on the left hand, or above, or immediately below, provided it is so placed as to leave no doubt as to the candidate for whom the vote was intended. Further, where a proper cross has been made designating the intention of the voter to vote for a particular candidate, and leaving no doubt as to what candidate he intended to vote for, I am not prepared to say that the addition of a score or a double leg to the cross,—which may have been the result of awkwardness or accident, or of not exactly seeing how he was to commence the cross,—ought to be visited upon the voter by nullifying his vote. I think it is very difficult to draw a line (on the principles adopted by my brethren) between such additions to the cross as shall be fatal and such additions as shall not be fatal. It appears to me that what we ought to look to is this, whether the deviations from or additions to what the statute requires can be held to accomplish the desire of the voter to let his choice be ascertained independently of a previous concert of a censurable kind with the candidate. Consider that the smallest tick, such as might escape the eye of even a vigilant officer, might be, and most likely would be, agreed upon between the candidate and the supposed corrupt voter, in order to satisfy the former that the latter had performed his promise to vote for him. A prominent—a decided mark—would be avoided. But whether it is a score, or whether it is a kind of double leg to the cross, or two crosses instead of one, it does not appear to me that we can lay down any distinct rule except this, that it must be something that indicates, in its own nature, an improper agreement with the candidate. As an illustration of what I think the danger of ruling that any additional score or cross or double

under consideration the judgment of the Court of Session in *Haswell v. Stewart*, but adopted a more liberal construction of the Ballot Act, and held that if a ballot paper be marked so as to show that the voter intended to vote for a particular candidate, and not for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he voted, then there is no enactment and no rule of law by which a ballot paper can be treated as void.¹

line shall be held to be fatal to the vote, I may refer to the fact that precisely the same additions have been made by voters on both sides; and certainly I think it is beyond all ordinary chance that the two candidates should have accidentally agreed upon the same marks to indicate the votes given for them by electors.

As to the place of the mark, I think the important matter, in reference to the validity of the paper, is, that the cross shall be so placed as to ascertain the candidate for whom the voter intends to give his vote,—that it shall be so near the name of that candidate as to show the intention of the voter,—whether it is on the left hand, or the right hand, or a little above, or a little below, I do not think that such circumstances are of any importance. Further, I do not think that a distinct score, which may have been merely the commencement of making a cross, is more suspicious than a small mark not assuming the proportions of a line, but something that, by reason of previous concert, will equally serve the corrupt purpose of the voter. While, therefore, I have no hesitation in rejecting the two papers, on one of which there is a mark on the outside, and on the other of which there is in the inside no cross at all, I am not prepared to reject any of the others.—O'M. and H. Reports, Petitions, vol. ii. p. 215.

¹ *Woodward v. Sarsons*, 9th July 1875. L. T. vol. xxxii. (N. S.), pp. 867-873; L. R. (C. P.), vol. x. pp. 733-751; Appendix No. 1 to the Report of the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876), pp. 109-117.

The judgment of the Court of Common Pleas (consisting of Justices Brett, Denman, and Archibald) was prepared by Mr. Justice Brett, and read in his absence by the Chief Justice, Lord Coleridge.

The portion which set forth the principles to be applied in determining the validity or invalidity of the votes objected to is as follows:—

“In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken; and in order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part, which

Still later, a municipal election in Musselburgh having been disputed, the Lord Ordinary (Craighill) reported the case to the Second Division for their opinion on the three following questions:—(1) Whether a cross or mark, when placed on the *left* hand side of the ballot

contains certain sections, and two schedules which contain certain rules, and forms, and by sect. 28, “the schedules and the notes thereto and directions therein shall be construed and have effect as part of this act.” The rules and forms, therefore, are to be construed as part of the act, but are spoken of as containing “directions.” Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that “the forms contained in this schedule, or *forms as nearly resembling the same as circumstances will admit*, shall be used.” And on the ballot paper, as given in the schedule, is “*Directions as to printing ballot paper*,” and “*Form of directions for the guidance of voters in voting*,” &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments, as distinguished from the absolute enactments in the sections in the body of the act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the act,—and which must be determined before determining what effect such breach has upon a vote or on the election,—the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The 2d section enacts, as to what the voter shall do, that “the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box.” This is all that is said in the body of the act about what the voter shall do with the ballot paper. That which is absolute, therefore, is, that the voter shall mark his paper *secretly*. How he shall mark it, is in the directory part of the statute. By rule 25, “the elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and *there mark his paper* and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box.” This rule, it will be observed, does not yet say how the paper is to be marked. But in schedule 2 is given the “Form of ballot paper;” and appended to the form is a note which, by sect. 28, is to be construed and have effect as part of the act. This note contains the “Form of directions for the guidance of the voter in voting.” “The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right-hand side, opposite the name of each candidate for whom he votes, thus X.” This is the only enactment throughout the statute as to the manner and form in which the voter is to mark the ballot paper. And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly; but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the act. The extent of error which is to vitiate so

paper, is, in the sense of the Ballot Act, a mark by which the voter has marked his vote; (2) Whether marks which are not in the form of a cross, and obviously were not intended to be in the form of a cross, are sufficient; and (3) Whether marks not in the form of a cross, and obviously not intended to resemble or to be parts of a cross, are things written or marked on the ballot papers by which the voter can be identified, and therefore are things by which the ballot papers on which they appear are rendered void. He referred to the judgment of the Court of Session in *Haswell v. Stewart*, and to the judgment of the Court of Common Pleas in England in *Woodward v. Sarsons*, and expressed an

as to annul the ballot paper, is further to be gathered from the statute itself. By sect. 2, "any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is *written or marked, by which the voter can be identified*, shall be void, and not counted." It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So, in Rule 36, "the returning officer shall report the number of ballot papers rejected and not counted by him, under the several heads of, (1.) 'Want of official mark'; (2.) 'Voting for more candidates than entitled to'; (3.) '*Writing or mark by which the voter could be identified*'; (4.) 'Unmarked, or void for uncertainty.'" And then, in schedule 2, in the note to the form before referred to, we have this warning:—"If the voter votes for more than — candidates, or places *any mark* on the paper *by which he may be afterwards identified*, his ballot paper will be void, and will not be counted." The result seems to be, as to writing or mark on the ballot paper, that, if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted: or, to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If

opinion that the two decisions could not be reconciled. After hearing counsel the Second Division called in Lords Deas, Ardmillan, and Mure, and a rehearing took place before the seven judges, when it appeared to be necessary for the decision of the case to determine only whether certain of the challenged voting papers were invalid in respect they were marked by a straight line instead of a cross opposite the name of the candidate for whom the vote bore to be given. On advising the case on 5th July 1876, the Court (Lord Deas dissenting) adhered to the judgment in *Haswell v. Stewart*, and held that the use of a straight line by the voter thus |, on the ballot paper, is not equivalent to a cross, as required by the Ballot Act, and is a mark by which the voter can or may be identified.¹

these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted; and, if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact, to be decided first by the returning officer, and afterwards by the election tribunal, on petition."

[The judgment then proceeded to apply these views to the votes in question, with the result stated in footnote 1, pp. 153, 154; footnote 3, pp. 87, 88; footnote 1, pp. 150/2, 150/3; footnotes 1 and 2, p. 150/8; and footnote 1, p. 151; and continued as follows]:—

"We are aware that in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions in the *Wigtown* case; but there may have been evidence in that case which does not exist in the present one, and which made many of the marks there marks of identification; which the mere presence of such marks here does not do. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benholme given in that case."

¹ *Robertson v. Adamson*, 5th July 1876, Court of Session Cases, 4th Series, vol. iii., pp. 978-991; *The Scottish Law Reporter*, vol. xiii., pp. 631-635. The opinions of the judges of the Second Division, and other consulted judges in this case, were as follow:—

LORD JUSTICE-CLERK.—But for the recent judgment in the case of *Woodward v. Sarsons*, in the English Court of Common Pleas, we should probably not have requested your Lordships of the First Division to aid in the decision of the present question, but should, as matter of course, have followed the direct precedent of the previous judgment of the Second Division in the case of *Haswell v. Stewart*. But we thought it right, out of respect to the judgment in the English Court, as well as regard to the inexpediency of having a conflict of decisions in the two parts of the island on such a matter, to have the question raised in this case deliberately reconsidered. I took no part in the

After the Lord Justice-Clerk had expressed his opinion, it was discovered that the decision of the question to which it had been arranged that the Court should con-

previous judgment, and I have now very attentively studied the unquestionably grave and authoritative exposition of the views of the English judges in Woodward's case, but I have formed an opinion that, notwithstanding the difficulties attending the subject, the former decision of this Court was right, and should be followed in the present action.

The only question with which I mean to deal in delivering my opinion is that to which the case was ultimately narrowed, namely, whether five ballot papers which were tendered at the municipal election at Musselburgh in November 1875 for one of the candidates were invalid by reason of their being marked by a straight line, and not by a cross as directed by the Ballot Act.

The provisions of the Act which appear to be material are the following:—(*Reads* secs. 2, 13, 28; schedule 1, rules 22, 25, 36). It is argued that these provisions are directory only, and not imperative; and that therefore substantial and not implicit compliance with them is all that is required. I do not differ from this as a general proposition, for in regulating the practical exercise of the popular right of election there must of necessity be many things directed in which it would be inexpedient and mischievous to exact literal obedience to the mere words of the direction when the substance and intent of the provision have been fulfilled. But in considering whether the directions of the schedules, which form part of the statutory enactment, have been substantially followed, regard must be had to the nature and scope of the specific direction, and to the object of the statute in exacting it. Some of these provisions, such as the mere forms of the writs to be used, the election writ itself, the direction, the certificate and endorsement, the notice of election, and the nomination paper, even the form of the ballot paper, and such like, being matters purely of form, are to be as nearly in the forms given in the schedule as circumstances will permit. But the directions given to the elector and to the returning officer as to what he is to do, or what he is not to do, are of a different class, and some of them, at least, in order to be substantially, must be implicitly followed, especially in those matters which are prohibited. Thus, for example, it is provided that nothing is to be printed on the ballot paper, excepting in accordance with the schedule, and, again, that the voter is not to vote for more than the proper number of candidates, and the returning officer is to reject voting papers which present certain appearances. These and other similar enactments are injunctions and prohibitions which must be as specifically complied with as if they had been specially provided in the body of the statute.

The objections which have been taken to the voting papers before us are two. The *first* is, that the voter has not, as directed by the schedule, placed a cross opposite the name of the candidate for whom he voted, and has therefore not indicated, in terms of the statute, the person for whom he intended to vote. The *second* is, that, even if he have indicated for whom he meant to vote, he has placed a mark on the paper by which he may be afterwards identified, which is expressly prohibited by the injunctions in the schedule.

If the only object of the direction given to the voter to place a cross

fine itself would not settle the case, as the contending parties would still be left with an equal number of votes. It was therefore arranged that the remaining questions

opposite the name of the candidate for whom he votes (which is expressed in imperative terms), had been to ascertain for whom he intended to vote, the provision would have been construed favourably for the voter, and any mark which sufficiently indicated his intention might have been sufficient. Apart from the direction of the statute one could have had no difficulty in coming to the conclusion that the straight lines in the voting papers before us were meant to indicate, and do indicate, for whom the elector intended to vote. But we must take this direction along with the prohibition which follows, for if a mark which is not that prescribed in the statute be a mark by which the voter may be afterwards identified, it follows that the object of providing a special mark, and enjoining its use, was not only to enable the voter to indicate for whom he voted, but, by prescribing uniformity in such marks, to prevent the secrecy of the vote from being violated.

In regard to this most vital prohibition it seems clear, first, that it is not necessary in order to bring a mark placed on the ballot paper within the scope of the prohibition that it should disclose the identity of the voter on the face of it. Such a provision would have been futile, for nothing but a signature and a designation would have that effect. Even a signature by itself would not do so, as there might be other electors of the same name, and identification by handwriting requires extrinsic evidence. If, in addition to the cross required, the elector places a numeral or a letter in the corner of his paper, that of itself would, in my opinion, be sufficient to violate the prohibition, although, without inquiry, no one could tell who the voter was who had so marked his paper.

It must be remembered that this is not an enfranchising statute; it is an Act to regulate, and, in some measure to restrict, for great public objects, the way in which an existing franchise is to be exercised, and while we are not to read these restrictions in a narrow and vexatious spirit we are bound to construe them so as to accomplish the object in view. That object was to secure the secrecy of the elector's vote, to enable him for his own benefit to vote in secret, so as to free him from molestation or undue pressure in the exercise of his right; and, for the benefit of the other electors and of the public, to oblige him to vote in secret, in order to prevent his using his vote corruptly. It is for that reason that he is prohibited from putting any mark on the voting paper by which he may be afterwards identified.

In the second place, the only question which seems contemplated by the direction is, whether, on the inspection of the ballot paper, it bears a mark by which the voter may be afterwards identified. It is here that, with the greatest respect, I chiefly differ from the learned judges in the case of *Woodward*. They say that the prohibition means that the voter is not to vote "so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted,"—that is to say, that if he cannot be identified by seeing the paper itself, and if no other facts are available, it is immaterial what marks appear on the paper.

should be decided by the judges of the Second Division alone. In doing so, accordingly, they rejected (1) two ballot papers, Nos. 388 and 434, which were marked with

I find no such qualification in the words of the statute, nor do I think it harmonises with the reason of the prohibition. The statute does not appear to me to contemplate that the presiding officer shall refer to any facts excepting those which he finds on the paper itself. He is to look at it, and if he finds (1) that it is without the official mark, or (2) that the voter has voted for more candidates than he should, or (3) that it has a mark on it by which the voter can (or may) be identified, or (4) that it is uncertain, he is then and there to reject the vote. With the intent or object of these things, save what the paper discloses, he has, and can have, no concern. In regard to marks, he is to decide merely on their character, and if he finds that they are such as can or may lead to the voter being afterwards identified, he is to reject the vote, and if he does not so find, on inspection of the paper, he is to admit the vote. Whether the mark would, in point of fact, enable him to identify the voter, is of no consequence, and he can have no means of knowing. A committee of the House of Commons, or a court of justice, might inquire for months into the identity of the voter and not discover it; and yet all the time the mark on the paper may have disclosed it to the only person to whom the facts were available, and for whose information it was placed there.

To hold that before this prohibition is to receive effect there must be proof, either absolute or *prima facie*, of the intent with which the paper was so marked, would be to nullify altogether a provision which seems vital to the operation of the statute. The direction is not designed against the public notoriety of the voter's identity, but against those occult and concealed arrangements which might so easily frustrate the design of the Ballot Act,—such devices, in short, as, while the identity of the voter is concealed from the public, may lead to its being disclosed to a confederate—a confederate, it may be, who has paid the voter for his vote, and wishes to be assured that he has received value for his money, or one who has unduly used the influence of his position to compel the voter to take this way of informing him how he voted. A provision that these arrangements, when disclosed and proved, should nullify the vote, would have been entirely illusory; for the ballot was resorted to mainly because these secret and corrupt transactions could not be detected; and the provision I am now considering had, in my opinion, no other object but to baffle such practices by prohibiting absolutely, whatever the motive of the voter, marks which might aid in their perpetration.

It is this view which gives importance to the present case, but if it is well founded, it follows that the only mark which the voter is permitted to place on his voting paper is the simple and easy, but uniform one, of a cross, and that the direction to this effect is imperative. In cases in which it is plain, from inspecting the paper, that the voter had attempted, although ineffectually or imperfectly, to follow the direction of the statute, such misadventure should not invalidate his vote; but in the present case the paper discloses an intention not to follow the directions of the statute, but to substitute a different mark for that directed. I am of opinion that this is such a mark as may lead to the voter being

merely single strokes or short straight lines in the proper spaces opposite the candidates' names,—this being in accordance with the finding of the majority of the

afterwards identified, and that, therefore, the voting paper is invalid, and I am glad to find that in coming to that conclusion I not only concur with the views of Lord Neaves and Lord Ormidale in the Wigtown case, but with those of Lord Benholme also, for, while the latter differed in regard to some of the votes which were rejected by the majority, he concurred in thinking that a voter who had placed a straight line opposite the name of the candidate had not thereby indicated for whom he intended to vote in terms of the statute.

LORD DEAS.—The desire of your lordship to confine the argument and the opinions in this case to a single point places me in some perplexity. I should have liked to have heard a full argument upon all the points in connection with each other, and particularly as to the effect attributed to a two-legged stroke and a one-legged stroke, or, in other words, the difference between a straight stroke and an angular, or what has been said to be a double stroke. But as yet I have been unable to find any substantial difference between the two.

I have no doubt that the instructions in the schedule annexed to the act are directory merely, but that does not solve the present case, because, even though directory, they must be substantially complied with. The difficulty is, what is substantial compliance?

The construction of the Act was very fully discussed and considered in the Wigtown Burghs case in this Division of the Court, and in the English case of *Woodward v. Sarsons*. In the imperfect shape in which the matter is now placed before us I shall not resume the consideration of it at any length, but shall content myself with saying that I have come to the same conclusion with that which was come to in the English case of *Woodward*. I do not, of course, regard that decision as a precedent which we are bound to follow; but I adopt the reasons judicially assigned for it, which are much more satisfactory to my mind than those on the other side.

LORD NEAVES.—I concur in the view of your lordship in the chair that we must dispose of the point which at the discussion was said to be the test of the case. Whether it may afterwards appear not to be the turning-point I do not anticipate. Our judgment falls now to be given on the point raised in argument and taken to *avizandum*.

I take it, the best example of the point to be decided is on the ballot paper No. 434, where we have on the right-hand side of the candidate's name a straight stroke.

The effect of directions in such a statute as this requires to be carefully considered. It is impossible to say that they are there for nothing. We must, indeed, allow for such deviations as ignorant men might make, and so must construe these directions with some latitude. On the other hand, this is an important Act, contrived to secure the freedom of voters from interference before or after an election by those who have influence over them. Whatever we may say as to strictness to be observed in enforcing these directions we cannot say that they are not part of the act. They are expressly made so.

A cross is enjoined to be made, and the question before us is whether a line, such as we have here is or is not a cross in compliance with the

seven judges; and (2) ten ballot papers on which the crosses were placed to the left-hand side of the candidates' names,—this being in accordance with the decision

statute. I should have great difficulty in saying that it was in compliance with the statute. I cannot imagine that a man who votes at either a parliamentary or a municipal election does not know what a cross is. It is unquestionably made up of two lines. What can have been the meaning of the man who, being enjoined to make a cross, and knowing what a cross is, makes only a straight line? He may never have meant to make a cross at all—he may never have meant to vote at all, but only to appear to vote. He may have been driven to the poll, and have been obliged to appear to vote, and yet never intended to vote, but wished to evade the duty. A man who is presumably capable of making a cross and makes a line must either have forgotten what he had to do, or must have wilfully abstained from doing it. The vote is not a complete one. What is required for that purpose is no act of caligraphy, but merely to make what is the simplest and best known sign all over the world. Where that is not made there is no *exita voluntas* to complete the vote.

Such a deviation may also come under another part of the statute which provides against any mark by which a voter may be identified. The provision does not bear “can be” or “is,” but “may be.” One can quite understand that such a system of marking as there is here might have been prearranged. It is an unnecessary and inexcusable deviation from the statute, and an inexplicable one, unless as a means of enabling some one to identify the voter.

I think the purpose of the statute would be defeated in a matter of essential importance if we sustained these papers. I adhere to my opinion in the Wigtown case, and think generally that the marking of such a line is only explainable in two ways, either that the voter did not intend to vote at all, or that he made this mark to show some one that he had voted according to a prearranged plan.

LORD ARDMILLAN.— . . . I concur with your lordship that this is not an enfranchising statute; it is a procedure Act. The object is to protect voters from undue influence, and the mode adopted is to secure secrecy of voting.

The act lays down rules for voting, partly in the body of the act itself, and partly in schedules. The distinction is a just one, that what is in the body of the act is absolutely imperative, while what is in the schedules may be directory only. In this case I do not think that the schedules are absolutely imperative. I cannot say that no deviations, however trifling, can be permitted. Where, for instance, a person has tried to make a cross according to the best of his ability, I do not say that a slight slip in making the cross will render the vote bad. But when he makes a figure, or a mark, which is most emphatically not a cross, the result is different. Besides, where a person makes a mark different from a cross, whereby he may be identified, the vote is bad. The object of the statute is that every mark should be a cross,—that all the marks should be as nearly alike as possible,—so that no single paper can be so identified as to trace the voter.

Here, instead of a cross, a line has been made, plainly not in the attempt to make a cross, but quite a different mark. This might have been a mark made by arrangement,—agreed on between the voter and a

in the case of *Haswell v. Stewart*. And they sustained (1) twenty-three ballot papers with the crosses on the right-hand side of the candidates' names, but not within

confederate, and intended to promote discovery of the vote, if that should be desired, contrary to the principle of the statute. This would defeat the secrecy which the Act was intended to secure.

I therefore concur in the opinion of the Lord Justice-Clerk that we should sustain the objection, so far as it regards these voting papers marked with a single stroke or line. I indicate no opinion as to the value of the marks more nearly resembling a cross, and more likely to have been made with the intent of forming a cross.

I am satisfied that these marks before us, with a line or stroke, are not even an attempt to fulfil the directions of the statute.

LORD ORMIDALE.— . . . The question to be determined is one of importance and interest, and all the more considering the conflicting judgments on the points upon which it turns of this Court in the *Wigtown Burghs Parliamentary Election* case, *Haswell v. Stewart*, vol. i. 4th Series of Court of Session Cases, 925, and of the Court of Common Pleas in the *Birmingham Municipal Election* case, *Woodward v. Sarsons*, July 9, 1875, *Law Reports, Common Pleas*, vol. x. p. 733. In consequence of this conflict I have very carefully examined the grounds upon which the two Courts have proceeded, and although I was one of the majority of the Court by which the *Wigtown* case was decided I need scarcely say that I should, if satisfied I was then wrong, have had no hesitation in now deciding differently.

In the *Wigtown* case this Court held that according to the sound construction of the Ballot Act it is obligatory on a voter to mark the ballot paper with a cross to the right of the candidate's name for whom he intends to vote, while in the *Birmingham Municipal Election* case it was held by the Court of Common Pleas that this was not obligatory, but merely directory, and that it was sufficient if the voter indicated the candidate for whom he intended to vote by a mark, whether a cross or not, on the front or face of the ballot paper. Again, while it was decided by this Court that any substantive writing or mark by the voter other than a cross,—making allowance for what might reasonably be held the various ways in which different persons, from age or otherwise, might make such a mark on the ballot paper,—would invalidate it, the Court of Commons Pleas held that other marks, whatever might be their form, made by the voter on the ballot paper, would not void the vote, provided it was not marked so as to show that he intended to vote for more candidates than he was entitled to vote for, or so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote.

Such is, stated generally, the difference betwixt the decisions of this Court and the Court of Common Pleas in regard to the marking of ballot papers by voters. But another and a very important difference—one indeed upon which the question which of them is right very much, if not entirely, depends—arises in regard to the true interpretation and effect of that part of section 2d of the Ballot Act which enacts that the ballot paper on “which anything except the number on the back is written or marked by which the voter can be identified shall be void and not counted.” It was held by this Court that according to the





the spaces marked off for them on the paper; (2) a ballot paper (No. 327), in which the cross was incomplete, and was placed in the spaces containing the candidates' names, and on the right-hand side thus:—

4	<div>MACKINLAY. ✓</div> <div>(JOHN MACKINLAY, Blucher Hall, Musselburgh, Brick Manufacturer.)</div>	
5	<div>ROBERTSON. ✓</div> <div>(WILLIAM ROBERTSON, High Street, Musselburgh, Grocer and Baker.)</div>	
6	<div>SMART. ✓</div> <div>(CHARLES SMART, High Street, Fisherrow, Lathsplitter.)</div>	
7	<div>WILKIE. ✓</div> <div>(ALEXANDER WILKIE, Hope Park, Levenhall, Residenter.)</div>	

sound construction of this enactment it was enough to invalidate the vote that the mark other than a cross in some reasonable form is of a description whereby the voter might be identified, not that he shall be identified, which of course could only be done by a separate proof or investigation, in which a great deal of evidence on the one side and the other might be necessary to be gone into ; while, according to the contention of the pursuer, the Court of Common Pleas held that such proof or investigation was indispensable, and must be gone into, and be found sufficient to identify the voter. Whether this is the construction put upon the act by the Court of Common Pleas does not appear to me to be clear ; and that it is a sound construction I am not prepared to admit. As to this matter I shall afterwards have some observations to make.

But let us see what is the nature of the ballot papers which the pursuer says were improperly rejected in the municipal election at Musselburgh, and which, if counted, would have resulted in his election in place of the defender Adamson. There are numerous ballot papers having marks upon them of various descriptions other than a cross, and on parts of the paper other than to the right of the candidate's name intended to be voted for—all as set out and exhibited by the state in the appendix to the closed record. It is unnecessary at present to inquire whether all of

(3) A ballot paper (No. 479) which was marked beside an uncompleted cross with a stroke thus :—

3	LAURIE. (GEORGE LAURIE, 38 Bridge Street, Musselburgh, Surgeon.)	
5	ROBERTSON. (WILLIAM ROBERTSON, High Street, Musselburgh, Grocer and Baker.)	
6	SMART. (CHARLES SMART, High Street, Fisherrow, Lathsplitter.)	
7	WILKIE. (ALEXANDER WILKIE, Hope Park, Levenhall, Residenter.)	

these marks are of a character to invalidate the votes. We can only at present deal with the papers having a straight line, thus |, on them in place of a X to the right of the favoured candidate's name. That was the only matter which has as yet been argued at the bar ; but how far that may be sufficient to determine the case may require consideration afterwards. The result, however, at which the Court may now arrive will not unlikely be of much service, if not conclusive, of any other point or points which may yet be raised.

According to the decision of this Court in the Wigtown case voting papers not having a cross on them at all, but merely a single straight line, are invalid, and have been properly rejected ; while, according to the decision of the Court of Common Pleas in the Birmingham Municipal case they are valid and ought to have been counted.

In considering the conflicting question which has thus arisen I think it is of much importance that it should be kept in view that the object of the Ballot Act is not to enfranchise or admit voters to the electoral roll, but to enable those who are already on the roll to give their votes in secrecy, and in that way to afford them what was thought to be a necessary protection in the exercise of the franchise. In this view, the Ballot Act ought, I think, to be construed so as its object may be accomplished as far as practicable. This, as it appears to me, for the reasons stated at length by the majority of the Court in the Wigtown case, may be done by a cross on the right hand of the candidate's name intended to be voted for—a mark which, in the words of Lord Neaves, is “ well devised for the purpose, easy of execution by men of the most

and (4) A ballot paper (No. 415) which was marked by two lines thus:—

2	DICKSON. (ROBERT DICKSON, High Street, Musselburgh, Grocer.)	1
3	LAURIE. (GEORGE LAURIE, 38 Bridge Street, Musselburgh, Surgeon.)	1
5	ROBERTSON. (WILLIAM ROBERTSON, High Street, Musselburgh, Grocer and Baker.)	1
7	WILKIE. (ALEXANDER WILKIE, Hope Park, Levenhall, Residenter.)	1

moderate intelligence, and at the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance." But if various other marks, quite different from a cross, or even one on the left, were, according to the judgment of the Court of Common Pleas, admissible, it cannot, I think, be doubted that the identification of the voters might thereby be established, and the great object of the Ballot Act entirely defeated. For example, let it be supposed that by prearrangement an understanding has been come to between a candidate, or some party acting for him, and a number of the electors, that they should put upon their voting papers a mark different from a cross, or even a cross, but on the left-hand side in place of the right-hand side of the candidate's name, it is plain that the candidates, or their agents present, as they are entitled to be, at the counting of the votes, could easily see how the electors with whom the arrangement had been made voted, and whether they had, or had not, adhered to that arrangement. In this way the voters might be identified, and the protection intended to be afforded by the Ballot Act defeated. Nor do I see how it would be possible for any party, other than those participant in the improper arrangement, to know anything about it, so as to be able by the necessary evidence to expose and frustrate its object.

I cannot help thinking, therefore, that the interpretation adopted by this Court in the Wigtown case, of clause 2d in the Ballot Act, to which I have referred, is the sound one. Nor am I able with certainty to discover from the report whether this may not have been also the

In sustaining the ballot paper No. 415, the Lord Justice-Clerk observed that there was wanting in the case of that paper "that clear determination not to make a

view of the Court of Common Pleas in the Birmingham case, for while in some parts of the judgment in that case extrinsic evidence of the identification of voters would appear to have been desiderated, in other parts this would rather seem not to have been considered necessary. Thus, I find that two voting papers having the name of one of the candidates written upon them were held to be bad without any extrinsic evidence of the actual identification of the voter who so wrote on the papers, merely because it "might give too much facility by reason of the handwriting to identify the voter."

Without entering further into the matter, which is amply explained in the reports of the two conflicting decisions in question, I have merely to add that I continue to be of opinion that the rules of construction of the Ballot Act given effect to in the Wigtown Parliamentary Election case, although stricter than those adopted in the Birmingham Municipal Election case, are sound, and not too strict, and therefore ought to be adhered to.

LORD MURE.—The only question we have now to consider is whether a single straight line marked on a ballot paper at the place where the voter is directed to put a cross is a sufficient compliance with the statute? Taking the 28th section along with the directions in the schedule I am of opinion that it is not, and I entirely concur with the exposition of the statute which has been given by your lordship in the chair. . . .

LORD GIFFORD.—If the purpose of the Ballot Act had been to confer an electoral franchise, or even to provide a convenient mode in which electors exercising the franchise should record their votes, I should have been disposed to hold that the directions as to filling up the voting papers were rather directory than imperative, and that if it fairly appeared upon the face of the ballot paper who the candidates were for whom the voter intended to vote I would be disposed to sustain the vote, even although the voter had to a considerable extent deviated from or failed to comply with the provisions or directions of the statute.

But I cannot lay out of view that one of the principal objects of the statute, if not the leading end which it had in view, was to secure absolute secrecy in voting, so that it should not be known for which candidate or candidates any elector voted, and that this should not be discoverable from the voting papers either by the candidates or their agents, although necessarily for the purpose of checking the counting and otherwise the voting papers are open within certain limits to the scrutiny of those interested.

Now, in this point of view, I agree with the majority of your lordships. I think that the directions for filling up the voting papers, so far as necessary to or conducive to secrecy of voting, are not merely directory, but really imperative, and therefore must be at least substantially observed. I agree that much in the statute may be directory, but wherever non-observance does or may destroy secrecy I think the case is different. If a variation is made in the mode of marking the votes,

cross," which was obvious in the case of the two papers (Nos. 388 and 434), bearing only single strokes, and which were rejected.¹ The result of the application of

of such a nature that it possibly, and by means of preconcerted arrangement may identify the voter to the candidates or their agents, I think this is enough to vitiate the vote, although there be no actual proof of such preconcerted arrangement. Thus, it is admitted on all hands that if the voter write his own name or initials, or even write the candidate's name, instead of marking a cross, the vote will be bad; and I think the same principle will apply to any other mark differing substantially and essentially from the cross required by the statute. I agree that if there be substantially a cross, or an obvious effort to make a cross, this will be enough, and the Court will always incline to sustain rather than to reject a vote *in dubio*; but I am of opinion that it is not too strict a reading of the statute to hold that the voter who refuses to make the statutory cross, but substitutes therefor a line, or a circle, or a square, or a triangle, or any other figure which may obviously be made the means of identification, loses his vote.

I concur, therefore, in the result reached by the majority of the Court that a mere straight stroke is not equivalent to the cross required by the statute.

The Report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876),—which was issued before the decision was given by the Court of Session in the Musselburgh Election case,—refers specially to the "contradictory decisions" in the case of *Haswell v. Stewart* and *Woodward v. Sarsons*, and contains the following passage:—"Your committee entertain the opinion that no ballot paper should be rejected unless it appears clearly to the returning officer that the obligatory portion of the act has not been complied with, and that the marking of the ballot paper in a manner not in accordance with the 'directions' should not cause its rejection, unless it appears to the returning officer that such departure from the directions has been for the purpose of identification, or would necessarily afford an opportunity for such identification being effected, or unless the returning officer is unable to determine for whom the voter intended to vote. Your committee strongly recommend the immediate passing of a short bill declaring the law to be in accordance with the judgment in the above-mentioned case of *Woodward v. Sarsons*, and giving effect to the opinion above expressed by your committee. Your committee further suggest that the Home Office should forward to every returning officer the law and judgment in '*Woodward v. Sarsons*'"—Report, p. iv.

¹ In dealing with this ballot paper, Lord Neaves observed,—“We have here, instead of a single stroke, two lines, which puts this paper in a different class from the other two.” Lord Ormidale, while he did not differ, observed that “although there are what may be called two strokes, I can discover no trace of an attempt to cross them. We must, however, make large allowances.” And Lord Gifford remarked,—“Although this is not exactly a cross, still it is quite distinguishable from the marks

these findings to the election in dispute, was that the defender Adamson was left in a majority of one.

The judgment in the Wigtown and Musselburgh cases must be regarded as the only authoritative declaration of the law in this country, and as such must receive effect from all returning officers in Scotland until the Ballot Act is altered.

From these judgments and the opinions of the majority of the judges, it must be inferred that every deviation from the precise mode of marking votes prescribed in the directions for the guidance of voters is to be regarded with suspicion and disfavour, as fitted to lead to the identification of the voter; and that when any deviation is material, the vote must be rejected, irrespective of absolute proof of design or intention on the part of the voter to be identified. The following must be regarded as material deviations from the prescribed form for marking votes:—

- (1.) Writing of any kind on any part of the ballot paper.

which we have rejected.”—[Court of Session Cases, Fourth Series, vol. iii., p. 991.]

¹ In the Wigtown election case of *Haswell v. Stewart*, tried before Lord Ormisdale on 6th April 1874, a ballot paper numbered 911 was objected to on the ground that it bore the name A. C. Allan, clothier, and thus afforded means of identification. It appeared that the voter numbered 911 on the register was not named A. C. Allan. The judge sustained the objection, observing:—“The construction which I am disposed to put on the statute is, that this name which has been written on the ballot paper might lead to the identification of the voter. It is quite clear that the statute does not contemplate that there should be an investigation at the time, or that the presiding officer was bound to inquire or to know anything about the name. It should have been enough for him that there was a name put on the voting paper which might lead to the identification of the voter afterwards. Therefore I must sustain this objection.”—[O’M. and H. Reports, vol. ii., pp. 216, 217.] The same view was adopted by the Second Division of the Court on the special case. See the opinions of the judges, quoted on pp. 129-136.

In the case of *Woodward v. Sarsons*, the Court of Common Pleas in England adopted a somewhat more liberal construction of the act in this respect. Two ballot papers, Nos. 844 and 889, had the word “Sarsons” written opposite the name of the candidate “Sarsons” printed on the ballot paper. No cross was marked upon it. A third ballot paper, No. 410, was marked with the letters “C. N.” A fourth, No. 3562, was

- (2.) The use of any form of mark indicative of a determination on the part of the elector not to make a cross. In other words, however rough, shaky, or uncouth the figure may be, it must be a cross, or a mark indicative of an effort on the part of the elector to comply with the Ballot Act to make a cross, and not a straight or curved line, or a circle, or an oval, or any other geometrical or anomalous figure.¹
- (3.) The placing of the mark, whether in the prescribed form or not, on the left-hand side of the candidate's name.²
- (4.) A substantive and separate addition on any part of

marked with the letter "P" in addition to the cross. A fifth, No. 911, had the name of one of the candidates, "Woodward," nearly struck out by a pencil mark through it diagonally across the paper; and a sixth, No. 638, bore the voter's signature. The returning officer did not reject these ballot papers, but allowed all of them as good and valid votes, and counted them for Sarsons. No objection to his doing so was made at the counting of the votes, but subsequently the election was challenged, and exception was taken to these votes on the ground that the writing or marks might enable the writer to be identified. The Court of Common Pleas disallowed the votes Nos. 844 and 889, observing:—"We, with some hesitation, disallow Nos. 844 and 889. There is no cross at all; and we yield to the suggestive rule, that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter." They also disallowed No. 410, inasmuch as it was marked with the letters "C. N." They sustained Nos. 3562 and 911, holding that the mark upon each of them was not "a substantial breach of the statute," though "extrinsic evidence might make such peculiarities indications of handwriting;" and they disallowed No. 638, holding it to be "clearly bad and void."—[*Woodward v. Sarsons*, 9th July 1875, L.T.; vol. xxxii. (N.S.), pp. 867-873; L.R. (C.P.), vol. x., pp. 733-751.]

¹ In the case of *Woodward v. Sarsons*, the Court of Common Pleas in England adopted a more liberal construction of the Ballot Act in this respect, and held that the precise form or position of the voter's mark is immaterial, provided it clearly indicates the candidate for whom the voter means to vote.—[L.T., vol. xxxii. (N.S.), pp. 867-873; L.R. (C.P.), vol. x., pp. 733-751.]

In the case of *Robertson v. Adamson* the Court of Session sustained a ballot paper marked by two lines, though there was no trace of an attempt to cross them. The principle on which this was done, as stated by the Lord Justice-Clerk, is recognised in the text.

² See the immediately preceding footnote. In the same case of *Woodward v. Sarsons* the Court sustained eight ballot papers, Nos. 117, 155, 190, 505, 174, 183, 842, 1413, marked with a cross placed on the left instead of the right-hand side of the candidate's name, observing

the ballot paper to the voter's mark of his vote. This includes a multiplicity of crosses, or lines, or marks of any description, either on the back or the face of the ballot paper.¹

with reference to them :—"The substance of the directions in the note in schedule 2 is fulfilled, which is, in our opinion, that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactments as to secrecy be obeyed fully, we think that the statute is satisfied." [Woodward v. Sarsons, *ut supra*.]

¹ In the Wigtown election case of *Smith v. Stewart*, 6th August 1874, objection was taken to ballot papers on the ground that they contained marks separate from the cross. Lord Neaves disallowed the objection, observing—"These are matters that run into each other so much that it is impossible to lay down any clear and broad principle, and I think I must follow the maxim, *De minimis non curat Praetor*. . . I am not disposed to disqualify a voter for a trifling thing such as a spot or a dot on his voting paper. No. 1089 has the appearance of a speck or a dot, but I shall hold it to be a good vote." [O'M. & H. Reps., vol. ii. p. 232.]

See footnotes 1 and 2, page 150. In the case of *Woodward v. Sarsons*, the Court sustained five ballot papers, Nos. 433, 926, 928, 1364, and 1426, marked with two crosses instead of one; one ballot paper, No. 1726, marked with three crosses instead of one; one, No. 2140, marked with a straight stroke in addition to the cross; one, No. 8781, marked with a straight line instead of a cross; one, No. 641, marked with a star instead of a cross; and one, No. 3562, marked with the letter "P" in addition to the cross,—observing, "We cannot think that the mere fact of two crosses being placed, as in No. 433 or as in 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote, and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voter would place two marks, so as to indicate that it was he, that voter, who had used that ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not in our judgment a substantial breach of the statute. Neither is the mere fact of an additional mark, such as is found in No. 926; nor the mere fact of the peculiar forms of cross in Nos. 1364 and 641, nor the marks on Nos. 1726, 2140, 3562, or 911 "[in which the name of one of the candidates was nearly struck out]," though in these cases also extrinsic evidence of arrangement might make such peculiarities indications of identity. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on 875 substantially indicates that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. . . . The substance of the direction in the note in schedule 2 is fulfilled, which is in our opinion that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactment as to secrecy be observed fully, we think that the statute is satisfied. [L. T., vol. xxxii. (N. S.) pp. 872-873; L. R. (C. P.) vol. x. pp. 733-751.]

On the other hand, the following may be regarded as immaterial deviations, unless, indeed, there be collateral circumstances to create the presumption of design or intention on the part of the voter to lead to identification.

- (1.) The cross not being well made, or the lines being somewhat shaky and irregular, arising apparently from unsteadiness of hand, or accidental disturbance.¹
- (2.) The cross having feet or claws to support it, like the capital letter X.
- (3.) The cross not being placed in the space allotted to it on the ballot paper, if it be opposite the candidate's name, and towards the right of the name.²

¹ Applying the principles recognised in the Wigtown case of *Haswell v. Stewart*, Lord Neaves, in the Wigtown case of *Smith v. Stewart*, 6th August 1874, sustained votes to which it was objected that the ballot papers contained badly-formed crosses, observing that "mere clumsiness" is not sufficient to disqualify. "Further," he added, "there may be vacillation to a certain extent in the hand, and the voter may go back on one leg of his cross to make it more complete, and so to give it the appearance of a double stroke; but I cannot disqualify on that ground unless I see so much deviation from what an ordinary and rather rough writer would be able to do. No. 534 has a thick and clumsy line; but it appears to me to be nothing more than a blunder in the mode of forming the cross." [O'M. and H. Reports, vol. ii. p. 232.]

² In the same case objection was taken to several ballot papers on the ground that the cross, although put on the right-hand side of the candidate's name, was not put in the precise place required by the Ballot Act. Lord Neaves disallowed the objection, and observed—"The first question is, whether there has been a deviation from the statute? Now I cannot see that any definite amount of space with reference to the name is an absolute essentiality in the ballot paper. The other question is whether the mark is such as to suggest the possibility of fraud. I do not think that the objection on either ground is good." [O'M. and H. Reports, vol. ii. p. 232.]

In the Borough of Athlone Election case, tried before the Court of Common Pleas at Dublin on 24th April 1874, the returning officer rejected the votes of several persons who had placed their cross immediately after and opposite the candidate's name in the ballot paper, and in the compartment or division of the ballot paper on which the candidate's name was printed, but not in the space outside the compartment, and separated therefrom by a vertical line. He also rejected the votes of several persons who placed their cross immediately before and opposite the candidate's name in the ballot paper. The Lord Chief Justice (Monahan), who delivered the judgment of the Court, said—"As a matter of fact we entertain no doubt at all that under the true construction of this Act of

- (4.) The marking of the cross in ink, or otherwise than with a pencil, provided there be no peculiarity in the form of the marking, or in the colour, such as would result from the use of blue or red lead or ink.

When the presiding officer or polling clerks mark the voter's number on the register, not on the counterfoil, but on the ballot paper; or on both the counterfoil and the ballot paper, a cardinal requirement of the Ballot Act is contravened, inasmuch as the number on the ballot paper enables the voter to be immediately identified. Such a number placed on the ballot paper by the voter would undoubtedly vitiate the vote, and he would have no reason to complain. But when the contravention is obviously and admittedly occasioned by the fault of the presiding officer or polling clerks, it is hard to reject the votes of innocent electors, and, it may be, necessitate a new election. Nevertheless, the returning officer will not be warranted in sustaining such votes.¹ The consent of the candidates or their

Parliament the votes on the right-hand side of the ballot papers ought to have been received by the Sheriff." It was unnecessary to decide the question as to the votes on the left-hand side. [O'M. and H. Reports, vol. ii. p. 186.]

See the case of *Woodward v. Sarsons*, 9th July 1875, L. T., vol. xxxii. (N. S.) pp. 867-873; L. R. (C. P.) vol. x. pp. 733-751. The judgment of the Court of Common Pleas in England in this case is printed partially in the footnote, pp. 186-191, and partially in the footnote, pp. 136-139.

¹ In the case of *Woodward v. Sarsons*, the presiding officer at the polling station, No. 130, in the Birmingham Municipal Election, marked upon the face of the ballot paper given to each of the electors at the station the number of the voter appearing on the burgess-roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward, and 60 in favour of the respondent Sarsons. The burgess-roll numbers so marked were in fact not seen so as to be identified; but they could have been seen by the persons present at the counting of the ballot papers. The returning officer rejected all the ballot papers so marked, and the Court confirmed his decision,—observing: "It is clear that the 294 ballot

agents to waive objection, and to accept the result of the vote as ascertained by the returning officer, without looking at the elector's number, or otherwise seeking to violate the secrecy which the Ballot Act enjoins, cannot justify the returning officer in departing from the express provisions of the statute. The community as well as the candidates are interested in the election.¹

Another irregularity of the presiding officer or his clerk may give rise to much trouble and expense, and invalidate the election, but it is one which does not come under the observation or cognizance of the returning officer. When the voter's number in the register is omitted to be marked on the counterfoil of the ballot paper, the omission renders it impossible to connect the ballot paper with the voter, and to check personation.² But the ballot paper and the vote which it records may be *ex facie* unobjectionable, and as the counterfoils are sealed up, neither the returning officer nor the candidates may be aware of the irregularity which

papers marked by the presiding officer at the polling station No. 130, were void, and ought not to be counted. There was a mark on them by which, on reference to the burgess-roll, the way in which the voter had voted could be identified." Notwithstanding this and other irregularities the election was sustained, on the ground that the result of the election was not thereby affected. [L. T., vol. xxxii. (N. S.) pp. 867-873; L. R. (C. P.) vol. x. pp. 733-751.]

¹ In this view the writer is confirmed by the opinion of the Dean of Faculty (Mr. A. R. Clark), given in October 1874.

² In the case of *Pickering v. Startin*, 13th January 1872, certain votes were objected to on this ground, but the judges do not appear to have held that the omission necessarily either nullified the votes or invalidated the election. [L. T. (N. S.) vol. xxviii. p. 111.] In subsequent proceedings, and after a scrutiny, the election was sustained; and ultimately proceedings were adopted by the unsuccessful candidate against the presiding officer, on the ground that the negligent performance by him of his duties had resulted in the plaintiff's defeat. [*Pickering v. James*, 10th June 1873; L. R. (C. P.), vol. viii. p. 489; L. T., vol. xxix. p. 210.] But the objection referred to in the text does not appear to have been disposed of.

has been committed. If, however, it were afterwards timeously discovered and challenged, the result of the challenge would probably depend upon the circumstance whether the number of objections to the votes on the ground of personation, or on any other ground which necessitated the ascertainment of the electors, was greater than the majority in favour of the candidate declared to have had the majority of votes. If greater, probably a new election would be ordered.

It has already been observed,¹ that in no case should the name of a candidate appear on a ballot paper more than once, no matter how often he may have been nominated, possibly under different designations. Where, however, the name of a candidate has been erroneously placed more than once on the ballot paper, and there is no doubt that the voters who voted for him under any or all of the entries understood for whom they were actually voting, all the votes so given for the candidate must be classed together.²

¹ See No. 46, sub-section (4) of these Observations, and footnote 2, p. 60.

² In the case of *Northcote v. Pulsford*, 8th May 1875, a candidate at the Barnstaple municipal election of 1874 was twice nominated—one nomination being good, and the other bad—and his name appeared in the ballot paper twice, once in respect of each nomination. 71 voters appended their marks to his name under one nomination, and 301 under the other. Of these 71 and 301 electors, 8 marked crosses opposite both names. All the voters so voting intended to vote for the candidate, and the question was raised whether both classes of voters could be added together. If so, the candidate had the majority, and was entitled to be returned. The Court of Common Pleas in England held that, having been duly nominated, and having a majority of votes, he was entitled to be returned. In delivering the judgment of the Court, Mr. Justice Brett said: “Mr. Northcote was a candidate, and 372 electors voted for him, intending to vote for him. It is true that 71 voted for him under his description in No. 5, and 301 under his description in No. 6. If both the 71 and 301 votes can be counted as votes given for him, he was duly elected; and so, even though eight votes should be struck off on the ground that eight voters put two crosses to indicate their vote, one to No. 5, and one to No. 6, the question is, Whether all the votes given for him should be counted as votes given for him? The counting, it would seem, should be under section 35 of 5 and 6 Will. IV. cap. 76 (‘The

91. On all ballot papers rejected and not counted the returning officer must endorse the word "Rejected;" and if an objection be made to his decision by any candidate or agent, he must add to the endorsement the words "rejection objected to."¹ The operation of endorsing the rejected ballot papers will be greatly facilitated by the use of self-acting spring stamps, one to impress the words "Ballot paper rejected," and the other the words "Ballot paper rejected. Rejection objected to." The decision of the returning officer as to any question arising in respect of a ballot paper is final,

English Municipal Corporations Act'), as amended by the schedule of the Ballot Act. That, section 35, enacts 'That the mayor and assessors shall examine the voting papers so delivered as aforesaid, for the purpose of ascertaining which of *the several persons voted for are elected*; and so many of such persons, being equal to the number of persons then to be chosen, as shall have the greater number of votes, shall be deemed to be elected.' If the votes in the present case had been counted and treated according to the words of that section, the number of votes really given for the appellant entitled him to be declared to be elected. There is nothing to prevent the counting and treating of the votes according to the words of that section, and according to the truth, but the irregular form of the ballot paper. That irregularity of form neither deceived nor misled any voter into voting for a wrong person. It was an irregularity or mistake in the form of the ballot paper, the form of which is given in schedule Second of the Ballot Act. As the mistake neither deceived nor misled any voter into voting for a wrong person, it may properly be said that it did not affect the result of the election. The mistake therefore was, as it seems to us, cured by section 13 of the Ballot Act, which enacts that 'No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this act, or any mistake in the use of the forms in the second schedule to this act, if it appears, &c., that the election was conducted in accordance with the principles laid down in the body of this act, and *that such non-compliance or mistake did not affect the result of the election.*' That section is applicable to the taking of the poll, and the poll at a municipal election is to be taken or conducted according to the provisions applicable to a poll of the Ballot Act. That section is therefore applicable to the taking of the poll at a municipal election." [L. R. (C. P.) vol. x. pp 485-486.]

¹ See section 2 and rule 36 of schedule First of the Ballot Act.

subject to reversal in proceedings questioning the election.¹

92. When there is only one vacancy in any ward, the counting of the votes given in such ward will be expeditiously accomplished by simply separating the ballot papers into as many classes as there are candidates; and putting aside, in the first instance, all bad and doubtful votes, every ballot paper which is not marked in strict compliance with the directions for the guidance of voters in the voting being regarded for this purpose as doubtful. After all the voting papers have been so arranged, the bad and doubtful votes should be disposed of by the returning officer himself; and when the ballot papers are sustained, each should be placed in its appropriate class. When, however, any ballot papers are rejected and not counted, their faces should be submitted to the candidates or their agents, and if the decision of the returning officer be objected to, a memorandum of objection having been made must be endorsed on the ballot paper, as has already been explained. The ballot papers containing the votes for each candidate should be put up in bundles, each containing 50, and the number for each candidate ascertained. The ballot papers rejected on

¹ See sections 2 and 20, sub-section (2) of the Ballot Act.

In the case of *Hamilton v. the Police Commissioners of Dunoon*, 15th January 1875, it was objected to the validity of the election of Commissioners in October 1873, that the returning officer, who also acted as presiding officer, did not count the number of ballot papers in the box before proceeding to count the votes, nor did he mix the ballot papers, nor did he keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers, as directed by rule 34 of Schedule 1st of the Ballot Act. Nor did he endorse the word "Rejected" on the ballot papers which he rejected as invalid, as directed by rule 36. The Lord Ordinary (Gifford) held, on 27th October 1874, that none of these objections "affect the validity of the election as a whole," and he sustained the election. The First Division of the Court affirmed the judgment of the Lord Ordinary, and sustained the election, without pronouncing any opinion on the objections taken as to the irregularities committed by the returning officer, which it was held could not be entertained under the conclusions of the summons. See footnote 1 to Observation No. 61, pp. 84-85.

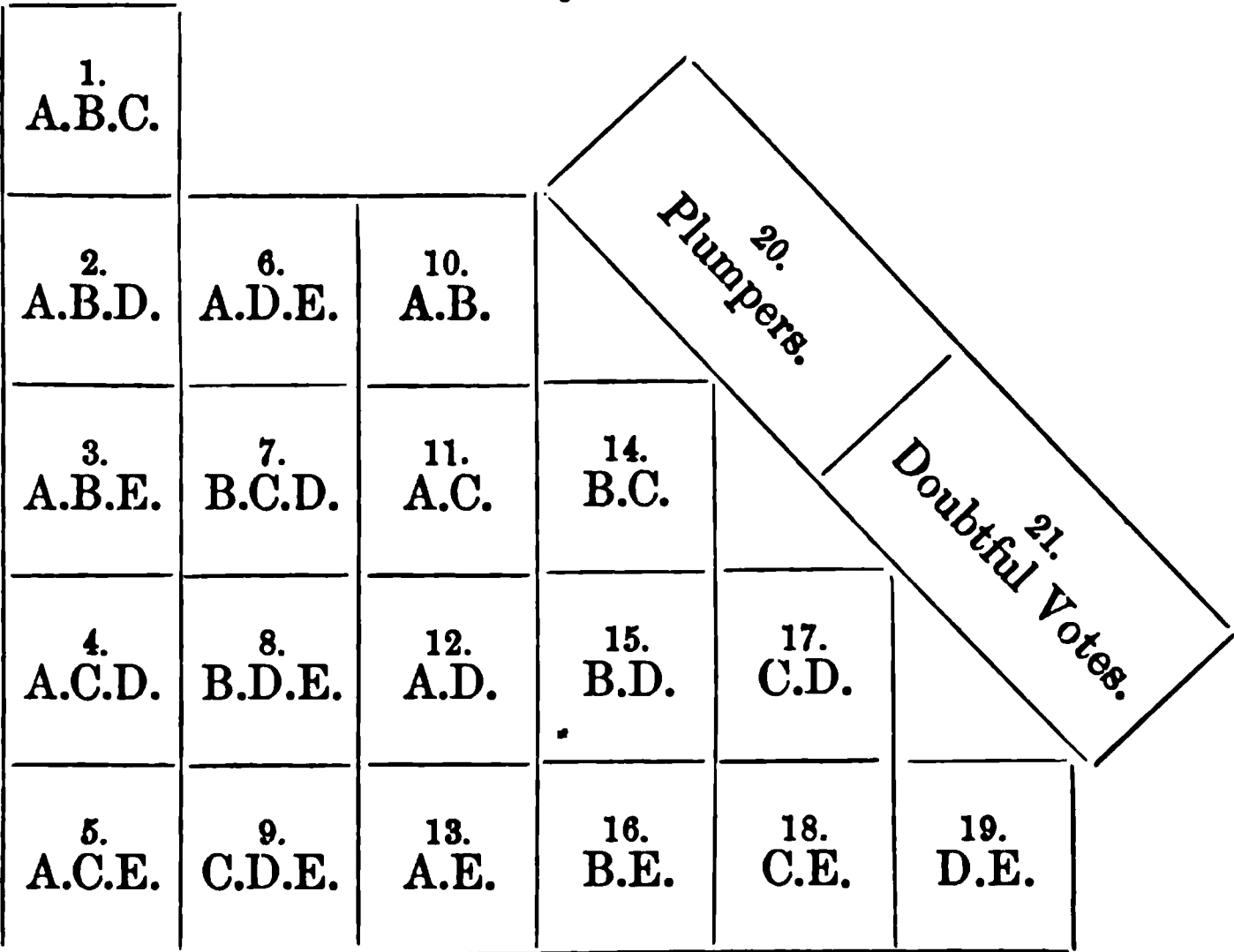
any of the four grounds specified in No. 90 of these Observations should then be arranged under one or other of these heads, having reference to the ground of rejection, and the number under each head should be ascertained and recorded.

93. When there are two or more vacancies in any one ward, and a larger number of candidates than there are vacancies to be supplied, it will be necessary either to adopt a more complicated arrangement for classifying the voting papers and ascertaining the number of votes given for each candidate, or to tabulate the votes for the several candidates. To explain each of the two methods which have severally stood the test of experience—the former in the parliamentary election in Glasgow in 1874, under the direction of the Sheriff of Lanarkshire, and the latter, under the direction of the writer, as returning officer in the first school board election in Edinburgh, and also as agent of the returning officer in the Glasgow municipal election of 1873–4,—let it be assumed that there are three vacancies in a ward with five candidates, named respectively A, B, C, D, and E.

94. If it be resolved to adopt the former method, it will be necessary to provide for each person who is to be engaged as an enumerator in counting the votes, an arrangement of twenty-one compartments or pigeon-holes—each compartment being sufficiently large to contain a considerable number of ballot papers, and having a distinctive number or mark indicative of the names of the several candidates, or combinations of candidates, for whom votes may be given. The subjoined diagram shows the nature of the arrangement adopted in the parliamentary election in Glasgow.¹

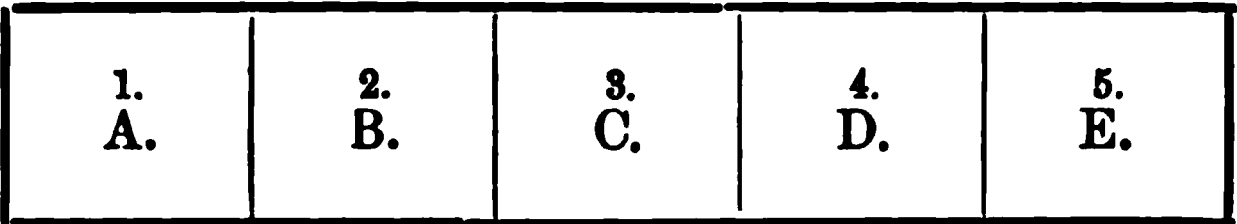
¹ If the compartments or pigeon-holes are made separately of wood, or tin, or card-board, they may be arranged in such number and combination as is found necessary from time to time, according to the number of vacancies and candidates in different wards, and at successive elections.

Arrangement No. I.¹



A corresponding arrangement of five compartments or pigeon-holes, but numbered or marked as in the subjoined diagram, will be provided for the reception of all the plumpers, *i.e.*, the ballot papers containing each a vote for only one of the five candidates, each compartment receiving the votes given for the candidate to which it is assigned.

Arrangement No. II.



An arrangement of nineteen compartments or pigeon-holes of greatly larger capacity, but numbered or marked, as in the subjoined diagram,—

¹ In a case in which there are two vacaneies and five candidates, the two left hand rows, containing Nos. 1 to 9, both inclusive, of the above diagram, would have to be removed.

Arrangement No. III.

1. A. B. C.	2. A. B. D.	3. A. B. E.	4. A. C. D.	5. A. C. E.	6. A. D. E.	7. B. C. D.
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8. B. D. E.	9. C. D. E.	10. A. B.	11. A. C.	12. A. D.	13. A. E.	14. B. C.
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15. B. D.	16. B. E.	17. C. D.	18. C. E.	19. D. E.
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will have to be provided for the reception of all the the ballot papers containing the votes given for several candidates, or combinations of candidates.

The arrangement first above explained will afterwards be referred to as “Arrangement No. I.,” that second explained will be referred to as “Arrangement No. II.,” and the third explained will be referred to as “Arrangement No. III.” The arrangement No. II. will be placed under the charge of an assistant, whose special duty it will be to distribute the plumpers among the several compartments to which they should be assigned. Each compartment or pigeon-hole of arrangement No. III. will be placed under the charge of an assistant, whose special duty it will be to see that no ballot paper is admitted into the compartment under his charge, save such as contains a good vote for the candidate or combination of candidates assigned to it. The counting of the votes will then proceed as follows:—

(1.) Immediately after the ballot papers in the several ballot boxes for each ward have been mixed together, the whole bundles of ballot papers for the ward will be distributed among the several enumerators, each of whom will proceed to distribute the ballot papers assigned to him among the several compartments or pigeon-holes of the Arrangement No. I., with reference to the votes given for the several candidates or combinations of candidates,—the plumpers being deposited in the compartment or pigeon-hole marked No. 20 in the diagram, and all the papers containing bad or doubtful votes being deposited in the compartment marked No. 21.

(2.) While the enumerators are thus engaged distributing the ballot papers among the several compartments in Arrangement No. I., other assistants, specially assigned to that duty, will remove the ballot papers from each of these compartments, and place them in the hands of the assistant in charge of the corresponding compartment of Arrangement No. III., or if plumpers, in the hands of the assistant assigned to Arrangement No. II., or if bad or doubtful votes, in the hands of the returning officer, to be disposed of by him.

(3.) Each assistant in charge of the several compartments in Arrangement No. III. will, so soon as he receives the ballot papers taken from the corresponding compartment of Arrangement No. I., carefully check each ballot paper, to see that no ballot paper but such as should be in the compartment under his charge is admitted; and on being satisfied on this point, he will deposit the checked ballot papers in his compartment. Any ballot paper which may have erroneously found its way into the papers handed him, will be returned to the enumerator to be placed in its proper compartment.

(4.) The assistant in charge of Arrangement No. II. will, in like manner, as he receives the plumpers taken from compartment No. 20 of Arrangement No. I., proceed to distribute the ballot papers among the several compartments or pigeon-holes of the arrangement under his

charge, and such ballot papers as may have been erroneously placed among the plumpers will be returned to the enumerator to be placed in their respective proper compartments.

(5.) Simultaneously with these proceedings, the returning officer will, in the presence of the candidates or their agents, dispose of the bad and doubtful votes in the way described in Nos. 90 and 91 of these Observations. Such ballot papers as are sustained will be placed in the appropriate compartments of Arrangement No. II. or No. III., and such as are rejected and not counted, on any one of the four grounds specified in the Ballot Act, will be endorsed and arranged under one or other of four heads, having reference to the statutory grounds of rejection. The number of ballot papers rejected under each of these heads should be ascertained and minuted.

(6.) While these operations are in progress, other assistants will be engaged putting up the ballot papers in each compartment of Arrangements No. II. and No. III. in bundles of 50, so as to facilitate the ultimate counting. After the number in each bundle has been checked, it will be secured by an elastic band, and redeposited in the appropriate compartment.

(7.) After all the ballot papers have been classified, counted, and put up in bundles, the number of votes for each candidate will be ascertained and recorded. The total number of ballot papers so disposed of, with the number of ballot papers rejected, should correspond with the total number of ballot papers accounted for in the ballot paper accounts.

95. If it be resolved to adopt the latter method of ascertaining the number of votes given for each candidate by tabulating the results of the ballot papers, it will be found convenient to adopt the following arrangements:¹—

¹ In his "Suggestions as to the Conduct of First Elections of School Boards in Burghs in Scotland," published in 1873, and in his "Suggestions as to the Conduct of Elections of School Boards

(1.) Tabulating sheets will have to be timeously prepared. Each sheet should bear a distinctive number, and be ruled with say 50 lines, so as to contain the results of 50 votes. In a ward in which 3000 electors may vote, 60 sheets will thus be required, besides extra sheets to supply the place of such as are spoiled. A number of sheets will also have to be prepared to receive an abstract of the votes for each candidate as recorded in each of the sheets above described.¹

(2.) After the ballot papers taken from the several boxes used at each ward election are mixed together, they should be arranged in bundles, each containing 50, and along with each bundle a tabulating sheet should be put up by means of an elastic band. The bundle should have inscribed upon it the same number as that on the sheet.

(3.) One of these bundles and sheets will thereafter be handed to an assistant, who will proceed to tabulate the votes indicated by each ballot paper in the bundle. Here, as in the operation described in No. 92 of these Observations, every ballot paper not marked in strict compliance with the directions for the guidance of voters in voting will be put aside as doubtful, to be dealt with by the returning officer himself. When no doubt exists in regard to any ballot paper, the assistant will dictate to the clerk assigned to him the number of votes given for each candidate, overlooking the clerk at the same time, so as to see that no mistake is made in regard to the candidate under whose name the votes are placed. When the results of all the 50 ballot papers are thus tabulated, and the tabulating sheet filled up, the

in Parishes in Scotland," published in 1876, the writer recommended the mode of tabulating the votes explained in the text. It was generally adopted by the returning officers in the first and second school board elections throughout the country, and proved entirely satisfactory.

¹ See form of tabulating sheet, Appendix XVI., No. 25-2.

See form of abstract, Appendix XVI., No. 25-3.

sheet will be signed by the assistant and clerk, to vouch its accuracy. The bundle, having its number distinctly marked upon it, and the tabulating sheet, will then be put aside as counted, and another bundle and sheet examined and filled up in like manner.

(4.) When any ballot papers are found to be vitiated or doubtful, the assistant will hand them to the returning officer, and will obtain an equal number of others as often as may be required to enable him to fill up his sheet and complete the full number of 50 ballot papers in each bundle, before being put aside as counted.

(5.) While these operations are being proceeded with, two or more clerks accustomed to figures will be engaged in summing up the votes recorded for each candidate in the tabulating sheet, and in checking the summations. Each sheet will be signed by the clerks who have summed and checked it, so as to vouch its accuracy. They will also transfer to a general abstract the number of votes recorded for the several candidates in each tabulating sheet, will check such transfer, and afterwards sum up and check the abstract. Each sheet of the abstract will be signed by the clerks who made the transfer, and who have summed and checked it, so as to vouch its accuracy.

(6.) While the tabulating sheets are being filled up, summed, and abstracted by the assistants in manner above described, the returning officer will be engaged in disposing of the ballot papers which are handed to him by the assistants as bad or doubtful. All the objections to ballot papers, specified in No. 90 of these Observations, except uncertainty in the voting, will wholly vitiate the ballot papers; but it is quite likely that in many cases where two or three vacancies have to be supplied in any one ward, and when each elector is consequently entitled to give a number of votes corresponding to the number of vacancies to be supplied, he may have marked his vote distinctly for one candidate, but may have so marked the others, without exceeding the number of votes to which

he is entitled, as to leave it in doubt for what candidates these votes are intended. In every such case effect should be given to the good votes, and only the bad disallowed. Under the head "Unmarked or void for uncertainty," however, can be classed only those votes which are *wholly* void by reason of uncertainty. As each ballot paper is sustained by the returning officer in whole or in part, the result will be tabulated in the ordinary way; and as the counting of each bundle of fifty ballot papers is completed, it and the relative tabulating sheets should be put aside as counted. When any ballot papers are rejected by the returning officer, they will be endorsed, and disposed of in the manner explained in No. 91 of these Observations. The work of disposing of the bad and doubtful ballot papers is the most delicate part of the operation of counting the votes, and it may be supposed that before it is completed all the other ballot papers will have been counted and tabulated, and that the tabulating sheets applicable to them will have been summed up, checked, and abstracted.

(7.) Thereafter, the whole tabulating sheets and abstracts should be examined by the returning officer, and the number of votes given for each candidate ascertained.

96. When the returning officer has commenced to count the votes, he must, so far as practicable, proceed with the counting continuously, allowing only time for refreshment, and excluding, as has been already noticed, except so far as he and the candidates or agents otherwise agree, the hours between seven o'clock at night and nine o'clock on the succeeding morning. During the excluded time, the returning officer must place the ballot papers and other documents relating to the election under his own seal, and the seals of such of the candidates or agents of the candidates as desire to affix their seals, and must otherwise take proper precautions for the security of such papers and documents.¹

¹ See rule 35 of schedule First of the Ballot Act. In this rule, as in rule 29, no reference is made to the seals of such of the

97. Upon the completion of the counting, the returning officer must seal up in separate packets the counted and rejected ballot papers. He must not open the sealed packet of tendered ballot papers, or marked copy of the register of voters and counterfoils, but must proceed, in the presence of the candidates or their agents, to verify the ballot paper account given by each presiding officer, in so far as this has not been previously done, by comparing it with the number of ballot papers recorded by him as aforesaid, and the unused and spoilt ballot papers in his possession, and the tendered votes list, and must re-seal each sealed packet after examination.

98. A minute of the proceedings at the counting of the votes should then be prepared, and signed by the returning officer.¹ The returning officer should allow the candi-

candidates as may be present. Having regard, however, to rule 51, which empowers a candidate to undertake the duties which his agent might undertake, or to assist his agent in the performance of such duties, it will be prudent, though it does not seem to be necessary, to give such candidates as may desire to affix their seals an opportunity of doing so.

The report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876) contains the following passage on this subject:—"Your Committee are of opinion that, in any possible future amendment of the general provisions of the Ballot Act, it should be enacted that where the counting does not take place immediately after the close of the poll, or where it is interrupted after it has once begun, the ballot boxes and documents forwarded by the presiding officers shall be placed in some public building, and either guarded by the police, or protected by the sealing of all the issues from the room in which they have been placed with the seals of such of the candidates or their agents as shall demand such precaution."—Report, p. vi.

¹ See form of minute of proceedings, Appendix XVI., No. 25, p. [214]:—

The returning officer is appointed, by rule 29 of schedule First of the Ballot Act, to count and *record* the number of votes in each ballot box. He is also required to report to the Clerk of the Crown in Chancery, under Rule 36, the number of ballot papers rejected and not counted by him under the several heads of (1), Want of official mark; (2), Voting for more candidates than entitled to; (3), Writing or mark by which the voter could be identified; and (4), Unmarked or void for uncertainty; and under Rule 37, the result

dates or their agents to take a copy of this minute, if they wish to do so.¹

99. Every officer, clerk, and agent in attendance at the

¹ See rules 36 and 37 of schedule First of the Ballot Act.

of his verification of the ballot paper account. He is also directed, by Rule 37, to allow any agents of the candidates to copy such report before it is sent. Sub-section (5) of section 20 of the Ballot Act no doubt enacts that in municipal elections no return shall be made to the Clerk of the Crown in Chancery; but Rule 64, sub-section (b), enacts that all ballot papers, and other documents which, in the case of a parliamentary election, are forwarded to the Clerk of the Crown in Chancery, shall be delivered to the town clerk of the municipal borough in which the election is held, and shall be kept by him among the records of the burgh. It also declares that the provisions of part one of schedule First, with respect to the inspection, production, and destruction of such ballot papers and documents, and to the copies of such documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk, with the modification, that the council of the burgh, with the consent of the Secretary of State, shall have power to prescribe the regulations for the inspection of documents, and the fees for the supply of copies of documents, of which copies are directed by the Ballot Act to be supplied. It appears to the writer, that the fair meaning and construction of the provisions above referred to are, that while no report in regard to municipal elections is to be made to the Clerk of the Crown, it is the duty of the returning officer in such elections to preserve a record of the same particulars as the returning officer in parliamentary elections is required to make and transmit to the Clerk of the Crown, and to allow the agents of the candidates a copy of the same. Such a record is equally necessary in the event of a challenge of a municipal election as of a parliamentary election; and, on grounds of expediency, there can be no doubt that the regular minuting of all the steps prescribed by the Ballot Act and the relative schedules, with reference to the counting of the votes, is well fitted to secure regularity in the proceedings, and to facilitate subsequent review.

In the case of *Downie v. the School Board of Annan*, decided by Lord Mure on 18th November 1873, his Lordship sustained the right of the pursuer, who was town clerk of Annan, and had been appointed by the town council to act as returning officer in the first election of the school board for the burgh—to professional remuneration for his services as returning officer, and remitted his account to the auditor for taxation. The auditor allowed a charge for preparing and engrossing a minute of the proceedings at counting the votes, but his report was objected to so far as that charge was concerned, and the objection was sus-

counting of the votes must maintain and aid in maintaining the secrecy of the voting, and must not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper.¹ Contravention of the provisions of the Ballot Act in this respect is punishable, on summary conviction, by imprisonment for any term not exceeding six months, with or without hard labour.²

100. Difference of opinion exists as to whether a returning officer who, in the discharge of his duties, errs inadvertently, is to be regarded as a purely ministerial officer, and as such liable to be sued by persons prejudiced by his error; or whether his functions partake so far of a judicial character as to protect him from the consequences of all but wilful misconduct.

tained by the Lord Ordinary on 16th December 1873: In a note to his interlocutor, Lord Mure thus expressed his views:—“The Lord Ordinary can find nothing either in the statutes or the rules and regulations of the Board of Education which requires that any minute of election such as that here in question should be prepared; and as the document which was produced at the discussion, in so far as it purports to be a minute of what took place at the election, must and indeed bears *in gremio* to have been prepared before the election was declared, it is within the period of time for which the pursuer and his clerks have been paid; and although it may be quite proper for the returning officer to put down a minute of the proceedings as they occurred, it appears to the Lord Ordinary that the trouble of doing this, in so far as necessary, is fairly covered by the fees which have been allowed to him and his clerks. Those fees are considerably in excess of what the 16th section of the Ballot Act contemplates for presiding officers and clerks, and were probably not objected to because of the time during which the pursuer was engaged as returning officer after the poll had closed, in ascertaining the result of the poll.” The manner in which the expense of the minute is to be stated or sustained does not seem to be very material.

¹ This provision of the Ballot Act, it will be observed, does not extend to candidates.

² See footnote 3 to No. 73 of these Observations, p. 101.

See section 4 of the Ballot Act.

In the case of *Barnardistone v. Soame*,¹ the House of Lords, affirming the judgment of the Exchequer Chamber, held that an action could not be maintained against a returning officer for having falsely and maliciously made a double return. North, C.J. (afterwards Lord Keeper Guilford), held the officer to be a *judge* as to declaring the majority, and therefore not liable, although he acted with fraud and malice. In the subsequent case of *Ashby v. White*,² Lord Holt, C.J., and subsequently the House of Lords, held the office of a returning officer to be merely *ministerial*. "That the officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election by receiving their votes, computing their numbers, and returning the persons elected; the sheriff or other officer of a borough is put to no difficulty in this case, but what is absolutely necessary in all cases." From the report of Lord Holt's judgment, revised by the judge himself, it appears that fraud and malice on the part of the returning officer were averred and proved, and that the action was held to lie because of the fraud and malice. This still further appears in the argument prepared by the committee of the House of Lords on the question which the case originated between the two branches of the Legislature. In that argument it was said, "There is no danger to an honest officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such case, nor can any court direct them to do it; for it is the fraud and the malice that entitles the party to the action." In the

(1689) 6 Howell's State Trials, 1095.

² Trinity Term, 2 An. Reg., 2 Lord Raymond, 938. Smith's *Leading Cases* (7th ed.), vol. i. pp. 251-284.

case of *Cullen v. Morris*,¹ the double nature of the duties of a returning officer was pointed out by Lord Tenterden, who said, "The returning officer is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixed nature."² It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension if,

¹ (1819) 2 Starkie's N. P. Cases, 587; Corbett & Daniell's E. C, 163.

² The duties of the mayor of a corporation, acting as returning officer at the election of a councillor in England, are also partly *ministerial* and partly *judicial*. *The Queen v. Owens*, 11 June 1859, L. J. (Q. B.) vol. xxviii. p. 316; see also *the Queen v. White*, 27 June 1867, L. R. (Q. B.) vol. ii. p. 557. The distinction between the *ministerial* and *judicial* functions of a chairman of a board of health in England, acting as returning officer in an election of the board, under the Act 11 and 12 Victoria, cap. 63, was recognised by the Court of Queen's Bench in the cases of *the Queen v. Lofthouse & Wilson*, 4th May 1866 [L. R. (Q. B.), vol. i., p. 433], and *the Queen v. Backhouse*, 21st November 1866 [L. R. (Q. B.), vol. ii., p. 16]. In these cases it was held that the chairman's duty as regarded the sending out of voting papers, &c., under section 26, was *ministerial*, and that failure to comply with the requirements of the statute would render him liable to the penalty for neglect imposed by section 28, but that on examining and finally deciding on the validity of votes, under section 27, his action is *judicial*. In the case of *the Queen v. Cross*, 12th March 1852, L. T., vol. xix., p. 35, Lord Campbell held that the certificate of the chairman of a local board was final and conclusive as to the validity of the votes received, though, he said, it might be otherwise as to the mere casting up. The same principle was recognised in the case of *the Queen v. Collins*, 25th February 1876 [L. R. (Q. B.) vol. i. p., 336], where the Court of Queen's Bench held that the duty of a chairman in regard to the casting up of the votes is merely *ministerial*, and as to that his certificate is not conclusive, and may be impeached; but that, with regard to votes as to the validity of which the chairman arrived at a decision by inquiry, or might have held such inquiry, he had to exercise a *judicial* duty, and as to this, therefore, his certificate was conclusive. Aff. 4th November 1876. [L. R. (Q. B.) vol. ii. p. 31.]

in consequence of a mistake, he became liable to an action." In a case similar to that of *Ashby v. White*, before Mr. Justice Wilson,¹ that judge said, "All those who have acted in the case of *Ashby v. Whyte* have considered that the refusal must be wilful² and malicious in order to support the action. I think it cannot be said that because a returning officer is mistaken in point of law, this action will lie against him; in the present case I am clearly of opinion want of malice is a full defence."³ The passage quoted above from Lord Tenterden's judgment in *Cullen v. Morris*, was approved of by the Court of Queen's Bench in *Tozer v. Child*,⁴ in which churchwardens who had rejected the plaintiff's vote at an election of vestrymen were held not to be liable in damages, because it did not appear that they had acted maliciously. Having regard to these cases, and to the case of *Pickering v. James*,⁵ the law as regards the liability of returning officers appears to the writer to be substantially what has been stated with reference to the liability of presiding officers.⁶ As regards those portions of his duty which are purely ministerial, the returning officer is liable to action for damages at the instance of those who have suffered loss or injury in consequence even of his inadvertent failure or omission. In other words, where certain duties are plainly prescribed by statute, and these duties are not performed by the returning officer, and any person suffers injury in consequence, that person may sue the returning officer for damages without averring fraud or malice.⁷ When, however, the duties of the returning

¹ Cited by Mr. Justice Lawrence in the case of *Harman v. Tappenden*. 15 June 1801, 1 East's K. B. Cases, 562.

² *i.e.* "contrary to a man's own conviction," per Wilson, J. *Ibid.*

³ See also *Starling v. Turner*, Easter Term, 24 Carl. II., 1 Ventris' K. B. Cases, 206.

⁴ 7 Ellis & Blackburn's K. B. Cases, 377; 26 L. J. (Q. B.) 151.

⁵ L. R. (C. P.) vol. viii., p. 489; L. T., vol. xxix. p. 210. See opinions of judges partially quoted in footnote, pp. 103-108.

⁶ See No. 74 of these Observations, pp. 101-104.

⁷ It has been held, however, in England that a returning officer who had rejected the vote of an elector who, though on the roll and

officer are of a judicial or quasi-judicial nature, involving the exercise of judgment and discretion, mistake or error on his part will not render him liable to action at the instance of those whom that mistake or error may have prejudiced. To found such an action, it is necessary to aver and establish malice on the part of the returning officer; but, as has been observed,¹ malicemay be inferred from the conduct of the officer.

In the case of *Pickering v. James*, it was held that a presiding officer was not liable for acts done by the clerks appointed to assist him, inasmuch as the clerks are "appointed and paid by the returning officer, not by the presiding officer." "The relation of master and servant," it was said, "does not exist between the presiding officer and the clerk:" each is an independent officer, though the powers of the presiding officer are larger." Can it then be held that the returning officer, who appoints and pays presiding officers and clerks, and all the persons whom he may find it necessary to assist them, and between whom accordingly "the relation of master and servant" may be said to exist, is liable for the acts of the person so appointed? To subject returning officers to such a responsibility would be an intolerable hardship, and would prevent every prudent man from acting in such a capacity. Nor does it appear to the writer that such responsibility does attach to returning officers. The appointment of presiding officers, clerks, and assistants, is a necessary part of the duty of the returning officer, and is expressly authorised by statute. Provided, therefore,

so entitled to vote, was in fact disqualified, was not liable to an action for damages, in respect the person whose vote had been rejected could not qualify loss. The returning officer might nevertheless be liable to criminal proceedings for failure to perform the duty of receiving the vote imposed on him by statute [*Pryce v. Belcher*, 3d July 1847; 4 Common Bench Reports, p. 866].

¹ See No. 74 of these Observations, and cases quoted in footnote, p. 104.

² See footnote 2 to No. 70 of these Observations, p. 92.

the appointments be made in good faith, and in the exercise of a reasonable judgment, it is scarcely possible to suppose that liability could attach to the returning officer for any failure on the part of the persons so appointed, which failure the returning officer had no power to remedy. Neglect to appoint an officer whom he is authorised and required to appoint, may render a returning officer liable for resulting loss or injury, on the ground of omission to perform a ministerial duty. But having discharged the ministerial duty by appointing a person, who, in the exercise of a fair judgment, is fit for the office to which he is appointed, the returning officer may surely claim the protection which is due to the performance in good faith of a duty involving discretion and judgment.

In cases in which returning officers have been called in proceedings connected with disputed elections, the courts have invariably treated them with consideration and forbearance, even when their action was not approved.¹

¹ In the Warrington Election case, tried before Mr. Baron Martin on 4th February 1869 (footnote, p. 81), his Lordship said, "If any costs have been incurred by the returning officer by reason of the petition against him, he must be reimbursed." [O'M. & H. Reports, vol. i., pp. 44-45.]

In the Hackney case, decided on 14th April 1874 (footnote, p. 115), Mr. Justice Grove declared the election to be void, but held both the petitioner and members to be so perfectly exempt from blame that, "although they must incur expenses in reference to this petition, still of all cases that have yet been decided, this is certainly a case in which neither of the parties should be called upon to pay the costs of the other." He added, "But a third question intervenes—namely, by whose fault has this been occasioned? If I clearly saw my way to a jurisdiction in this matter, I might have pronounced an opinion upon that question; but having considered the words of the statute, (Parl. El. Act, 1868, secs. 41, 51), I am by no means clear that I have such a jurisdiction as would bear upon that particular matter; and, besides, I am by no means sure that if I had such a jurisdiction, and were to exercise it, I might not perhaps wrong one or other of the parties by prejudicing a remedy to which they may conceive they are entitled. In saying this, I must not be taken as expressing any opinion as to whether they have a remedy or not, or whether they ought to have one. Upon the whole, I think that

(7.) *Custody of the papers connected with the Election.*

101. The returning officer must thereafter deliver to the town clerk all the packets of ballot papers in his

the best decision I can come to with regard to costs in this matter is, without expressing any opinion upon the responsibility of the returning officer or upon what his liability is (for I think it is always desirable for a judge to do as little as he can in the way of expressing extra-judicial opinions) to make no order as to costs." [O'M. & H. Reports, vol. ii., p. 87.]

In the Athlone Election case (*Shiel v. Ennis*), 24th April 1874, referred to in footnote, p. 152, the returning officer rejected certain ballot papers which were sustained by the Court of Common Pleas in Ireland, with the effect of turning the election. In dealing with the question of costs, which were sought for either from the candidate who was unduly returned, or from the returning officer who appeared in the proceedings, the Lord Chief-Justice (Monahan) said, "It appears that the sheriff, as far as we can see, of his own instance, without either party insisting on it, ruled that all these votes (those marked on the right-hand side) should be rejected. That being so, we are of opinion there was no misconduct by either party. We think it a misfortune, but that, under the circumstances, the proper course is that each party must pay his own costs." [Ibid., vol. ii., p. 190.]

In the Mayo Election case (*O'Donel v. Brown and Tighe*), decided by the Court of Common Pleas in Ireland on 4th May 1874, the returning officer refused a poll to one candidate, and declared the two others duly elected. The Court unanimously held that the returning officer, who appeared in the proceedings, had erred grossly in not allowing a poll, and declared the election null and void. Nevertheless, the Lord Chief-Justice (Monahan) observed, "With respect to the costs of the petition, it appears that the agents of the respondents (the candidates whom the returning officer declared to be elected) insisted on the sheriff acting as he did, and they must, therefore, pay all the costs of the petition." [O'M. & H. Reports, vol. ii., p. 195.]

In the Drogheda Borough Election case, tried before Mr. Justice Barry on 29th May 1874 (footnotes, pp. 58 and 115), the returning officer was called, and appeared in the proceedings. On the question of costs the judge said: "I think it is a good general rule that the party who is successful should be indemnified as to costs by his unsuccessful adversary, or, in a case like this, by the person whose act has rendered necessary the litigation, and, in that view, I should have had to consider whether I should visit the costs of the petition on the returning officer or on the petitioner, or on both. However, having regard to the novelty of the question here

possession, the minute of proceedings at the counting of the votes, the ballot paper accounts, tendered votes lists, lists of votes marked by the presiding officer, statements relating thereto, declarations of inability to read, packets

raised, to the fact that the returning officer acted *bona fide*, and especially to the precedent furnished to me by the Court of Common Pleas in the Athlone case, I shall not adopt that course. In that case the petition was rendered necessary by a decision of the sheriff respecting some ballot papers, which decision was overruled by the court; but the court having regard, as I understand, to the *bona fides* of the sheriff, and to the fact that the unsuccessful candidate was seeking to maintain the ruling in his favour of the court below, resolved that all parties should bear their own costs. It seems to me that, having regard to the division of opinion in the Court of Common Pleas, this case is one *à fortiori* for the adoption of a similar rule, and, therefore, I declare that the parties shall abide their own costs." [O'M. & H. Reports, vol. ii., pp 211-212.]

In the Wigtown case (*Haswell v. Stewart*), referred to in the footnote, pp. 127, 128-136, and 149, the returning officer does not seem to have been called, or to have appeared. The election was voided; but Lord Ormidale, referring to the Athlone case, and to the principle therein recognised, held that the errors in the ballot papers not having been caused or suggested by the respondent, each party must bear his own costs. [O'M. & H. Reports, vol. ii., p. 231.]

In the Haverfordwest Election case (*Davies v. Lord Kensington and Harding*), 2d June 1874, the returning officer required Davies, a candidate, to deposit a sum to meet the estimated amount of the expenses of carrying into effect the provisions of the Ballot Act, or to find security for the same, as a condition precedent to putting him in nomination. Davies did neither, and did not even notice the returning officer's demand; whereupon the returning officer, ignoring the nomination of Davies, declared the other candidate, Lord Kensington, to be duly elected. The Court of Common Pleas held that the returning officer was not entitled to make such a demand, or to refuse a poll, and declared Lord Kensington's return to be void. On the question of costs, Lord Chief-Justice Coleridge said: "I am of opinion that the precedent in the Hackney case may very properly be followed here. Lord Kensington clearly was not wrong. He did not in any way interfere. It would be unjust, therefore, to saddle him with costs. The case of the returning officer is more open to doubt. Nobody casts any blame upon him, however, for the course he pursued; and there is no suggestion that he acted otherwise than upon an erroneous view of his rights. I therefore think he will be sufficiently punished by having to bear his own costs in this case. With regard to Mr. Davies, inasmuch as he

of counterfoils, and marked copies of registers, sent by each presiding officer, endorsing on each packet a description of its contents, and the date of the election in the particular ward to which they relate. These several documents must be kept by the town clerk among the records of the burgh, subject, as regards their custody and destruction,¹ to the directions of the council of the burgh.²

102. No person must be allowed to inspect any rejected ballot papers in the custody of the town clerk, except under the order of the sheriff court having jurisdiction in the burgh, or of any tribunal in which the election is questioned, to be granted by such court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required, for the purpose of instituting or maintaining a prosecution for an offence in relation to

did not condescend to reply to the letter set out in paragraph 6 of the case, I think he has only himself to blame if he also is left to bear his own costs." Mr. Justice Brett concurred. [L. R. (C. P.) vol. ix., pp. 729-730, 733; L. T. (N. S.), vol. xxx., pp. 612-613.]

In *Woodward v. Sarsons and Sadler*, 9th July 1875 [footnotes, pp. 87, 119, 136-139, 149, 150, 151 and 153], several objections were stated to the election of a councillor for one of the wards of the borough of Birmingham, on the ground, *inter alia*, of various departures from the provisions of the Ballot Act by the returning officer Sadler, as well as by presiding officers appointed by him. The Court of Common Pleas in England held that none of the irregularities committed at the election, nor the aggregate of them, avoided the election either at common law or under the Ballot Act. As regarded the question of costs, which was left in the discretion of the Court, they held, as between the petitioner and the respondent Sadler, that "inasmuch as there was no personal default by him, and the result of the election was not affected, each party must bear his own costs." [L. T. vol. xxxii., (N. S.) pp. 867-873; L. R. (C. P.) vol. x., pp. 733-751; Appendix No. 1 to the Report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876), pp. 109-117.]

¹ See No. 105 of these Observations as to the time during which these documents should be preserved, and the powers of the town council as to ordering their destruction.

² See rules 38 and 64 (b) sub-section (b) of schedule First of the Ballot Act.

ballot papers, or for the purpose of any proceeding in which the election can be questioned; and any such order for the inspection or production of ballot papers may be made, subject to such conditions as to persons, time, place, and mode of inspection or production, as the court making the same may think expedient, and must be obeyed by the town clerk. Any power which the Ballot Act gives to a court to the effect above expressed, may be exercised by any judge of such court at chambers. An appeal from the sheriff court may be had in like manner as in other cases in such sheriff court.¹

103. No person must, except by order of the sheriff court having jurisdiction in the burgh, or of any tribunal in which the election is questioned, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the town clerk. Such order may be made, subject to such conditions as to persons, time, place, and mode of opening or inspection, as the court making the same may think expedient, provided that on making and carrying into effect any such order, care must be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid.²

104. All documents delivered by the returning officer to the town clerk, in pursuance of the Ballot Act, other than ballot papers and counterfoils, must be open to public inspection, at such time and under such regulations as may be prescribed by the council of the burgh, with the consent of one of Her Majesty's Principal Secretaries of State; and the town clerk must supply copies

¹ See rule 40, sub-sections (b) (a) of rule 64, and rule 65 of schedule First of the Ballot Act.

See also sub-section (2) of section 20 of the Ballot Act.

² See rule 41, sub-section (a) of rule 64, and rule 65 of schedule First of the Ballot Act.

of or extracts from the said documents to any person demanding the same, on payment of such fees and subject to such regulations as may be prescribed by the town council, with consent of the Secretary of State.¹

The question as to whether the town clerk is bound under this rule to allow public inspection of the marked copies of the register of voters, is not free from difficulty. Rule 29 directs the counterfoils and marked copies of the register to be sealed up together, and rules 41, 64, sub-section (a), and 65, prohibit the opening of the sealed packet of counterfoils without an order of the sheriff court, or of a tribunal in which an election is questioned. On the other hand, rule 42 enacts that all election documents in the hands of the town clerk, "other than ballot papers and counterfoils," shall be open to public inspection. If, however, the marked copies of the register are sealed up with the counterfoils, and if the packet containing the latter cannot be opened without an order of court, it is obvious that access cannot be had to the marked copies of the register. On the whole, and though inspection of the marked copies of the register of voters can only show what electors voted, without giving any clue to how they voted, the safe course will be, not to allow inspection of the marked copies of the register except under the orders of court. At the same time, the course recommended in No. 78 of these Observations, of putting the counterfoils and marked register in separate packets, will preserve the secrecy of the former, even should inspection of the latter be ordered by a competent tribunal, as the first and indispensable step towards farther investigation.²

¹ See rule 42 and sub-section (a) of rule 64 of schedule First of the Ballot Act.

² In the case of *Stowe v. Jolliffe* (Petersfield Borough Election), 18th April 1874, application was made for an order to be allowed inspection of the rejected ballot papers, the counted ballot papers, and the counterfoils of ballot papers in the custody of the Clerk of the Crown in Chancery. The application was heard before C.-J. Cockburn and Mr. Justice Grove in chambers, and it was urged

105. The provisions of the Ballot Act, and the relative rules as to the time during which the several documents connected with the municipal elections are to be preserved, are not precise. The only provision in part I. of schedule First, with respect to the destruction of these documents, is that contained in rule 39, which directs the Clerk of the Crown to retain for a year all documents relating to an election forwarded to him in pursuance of the act by a returning officer, and then, unless otherwise directed by an order of the House of Commons, or one of Her Majesty's Superior Courts, to cause them to be destroyed.

for the petitioner that without precise information as to who the persons were who voted at the election, great unnecessary expense would be incurred in getting up the petitioner's case, inasmuch as a number of witnesses might be called at the trial to impeach the vote of a person who had not in fact voted at all. The judges, however, held that no case had been made out for the production of the ballot papers or counterfoils, because the information sought would be afforded by the marked copy of the register, which, by rule 38, the returning officer is required to forward to the Clerk of the Crown, and which is amongst the documents that under rule 41 are to be open to public inspection. No order was accordingly made. The question afterwards came up for disposal by the Court of Common Pleas, and the application was restricted to an order on the Clerk of the Crown to open the packet containing the counterfoils and the marked register of voters, and having opened it, to give the petitioner and his agent inspection of the marked register, but subject to the condition that he should not show them the counterfoils at all, but only the marked register; and further, that the sealed packet containing the rejected ballot papers be also opened, and the backs only of these documents shown to the petitioner and his agent, the petitioner being willing to accede to the condition that care be taken that the front of the rejected ballot papers be not shown, and that they should not leave the hands of the Clerk of the Crown; and further, that the inspection of the counterfoils shall be limited to such of them as have upon them a sequence number corresponding with the number on the rejected ballot papers. The court held that it was competent for them to grant inspection and a copy of the marked register of voters, upon an affidavit by the agent of the petitioner that, in his judgment and belief, it is requisite for the purposes of the petition, and for enabling him duly to prepare the case of the petitioner, that he should be allowed to inspect the same; and this notwithstanding the marked register was contained

Rule 64, sub-section (b), enacts, that in applying the provisions of schedule First to municipal elections, all documents which, in the case of a parliamentary election, are forwarded to the Clerk of the Crown in Chancery, shall, in the case of municipal elections, be delivered to the town clerk, and be kept by him among the records of the burgh; and that the provisions of Part I. of schedule First, with respect to the inspection, production, and destruction of such ballot papers and documents, and to the copies of such documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk,

in the same sealed packet with the counterfoils of ballot papers. Mr. Justice Brett held further that the inspection should be extended to the backs of the rejected ballot papers and the counterfoils, expressing at the same time the opinion, that the practice of granting inspection of documents under the Ballot Act should be regulated by the same rules which guide the courts in granting inspection in ordinary cases,—proper precautions being taken not to violate the secrecy of voting which it is the object of the act to insure. But Mr. Justice Grove and Mr. Justice Denman held that, assuming the court to have power to grant inspection of the last-mentioned documents, a strong case should be made out to warrant it, and that the petitioner in this case was not entitled to inspection. [L. R. (C. P.) vol. ix., pp. 447-460; L. T. (N. S.) vol. xxx., pp. 299-304.]

In the case of *James v. Henderson* (Durham City Election), 8th May 1874,—the Court of Common Pleas in England, following the precedent of *Stowe v. Jolliffe*, ordered the marked register of voters to be exhibited to the agent of the petitioner, — C.-J. Coleridge observing, “This is a very clear case. We are asked to permit the inspection of a public document, made open ‘to public inspection’ by the very terms of rule 42 (a). This order must be made as prayed.” [L. T. (C. P.) vol. xxx., p. 527.]

On this subject the report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876) contains the following passage:—“Under rule 42 of the First schedule of the Ballot Act, it appears to have been contemplated by Parliament that the copies of the register showing what persons had applied for papers should be open to inspection; but it is clear that the combined effect of rules 29, 37, 38, and 41, is to take away the right of inspection. With the view to restore this right, your Committee recommend that rule 29 should be so altered as to direct the keeping separate of the marked register, instead of its being sealed up with the counterfoils.”—Report, p. vii.

with the modifications—(1) that an order of the sheriff court having jurisdiction in the burgh, or any part thereof, or of any tribunal in which a municipal election is questioned, shall be substituted for an order of the House of Commons, or of one of Her Majesty's Superior Courts; but that an appeal from such sheriff court may be had in like manner as in other cases in such sheriff court; and (2) that the regulations for the inspection of documents, and the fees for the supply of copies of documents of which copies are directed to be supplied, shall be prescribed by the council of the burgh, with the consent of one of Her Majesty's Principal Secretaries of State; *and subject as aforesaid, the town clerk, in respect of the custody and destruction of the ballot papers, and other documents coming into his possession in pursuance of this act, shall be subject to the directions of the council of the burgh.* But for the proviso printed in italics, the obligation upon the town clerk would seem to be to preserve all the documents connected with each municipal election for a year, open to public inspection at the times, and subject to the regulations prescribed by the town council, with consent of the Secretary of State, and then, on the expiration of the year, to destroy them, unless otherwise directed by an order of the sheriff court, or of any tribunal in which the municipal election is questioned, or unless the regulations for the inspection of the documents made by the town council, with the consent of the Secretary of State, were inconsistent with such destruction. If, however, the words "subject as aforesaid," in the proviso which is printed in italics, have reference merely to the regulations for the inspection of documents, and fees, prescribed by the council with consent of the Secretary of State, that proviso would seem—(1) to relieve the town clerk of the duty of destroying the documents after the expiry of the year, unless he be directed to do so by the town council, and the destruction be not inconsistent with the regulations sanctioned by the Secretary of State; and (2) to give the town council power to order the destruction of the documents even before the

expiry of the year. It would be dangerous, however, even in royal and parliamentary burghs, where no challenge of an election of a councillor can be made after the lapse of a month from the date of his election,¹ for any town council to order the destruction of election documents till after the expiry of a year from the date of the election, or for any town clerk to act upon such an order. The safer course will be for each town clerk, after the expiry of the year, to obtain from the town council authority to destroy the election documents, and to destroy them accordingly, taking care before doing so that no question relating to the election is in dependence in the sheriff court or Court of Session, and that the destruction is not inconsistent with any regulations sanctioned by the Secretary of State as to the inspection of the documents.²

106. Where an order is made for the production by the town clerk of any document in his possession relating to any specified election, the production by such clerk or his agent of the document ordered, in such manner as may be directed by such order, or by a rule of the court having power to make such order, is declared by the Ballot Act to be conclusive evidence that such document relates to the specified election; and any endorsement appearing on any packet of ballot papers produced by the town clerk or his agent, is declared to be evidence of such papers being what they are stated to be by the endorsement. The production from proper custody of a ballot paper purporting to have been used at any election, and of a counterfoil marked with the same printed number, and having a number marked thereon in writing, is also declared to be *prima facie* evidence that the person who voted by such ballot paper was the person who, at the

¹ See section 5 of 16 Victoria, cap. 26.

² The Report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876) contains a recommendation, "that more distinct provision should be made for the destruction of the ballot papers and other documents relating to municipal elections."—Report, p. vii.

time of such election, had affixed to his name in the register of voters at such election the same number as the number written on such counterfoil.¹

107. All the provisions of the Ballot Act above referred to are framed with a view to secure secrecy in voting, and in reviewing them, it will be seen that they afford full protection to the voter, as well as the means of discovering and punishing personation. The corresponding numbers on the counterfoil and back of each ballot paper enable the two to be connected at any time, and the voter's number on the register, marked on the counterfoil, shows who was the person to whom the ballot paper was given. The possibility of a forged or counterfeit paper, bearing another number, being substituted for that obtained from the presiding officer, is prevented by the exhibition of the official mark on the back of the ballot paper, which must be shown to the presiding officer before the paper is deposited in the ballot box. It is only when access can be had to the counterfoil, the ballot paper, and the register, that it can be ascertained by whom the vote was given. But the law excludes the possibility of such access, in any case, till it is proved that the elector has voted, and till his vote has been declared by a competent court to be invalid. The fact of his having voted will be proved by the mark on the register in the hands of the town clerk; and if the vote is challenged on the ground of personation or otherwise the objection must be disposed of without reference to the question as to the candidate for whom it was given. If the vote be found to be good, all question is at an end, and it cannot be known for whom it was given. If the vote be declared to be bad, then and then only will the counterfoil, the ballot paper, and the register be put together, so as to ascertain for what candidate the vote was given, and from whose total it falls to be deducted.

¹ See rule 43 of schedule First of the Ballot Act.

(8.) *Miscellaneous Provisions as to Municipal Elections.*

108. In any indictment or other prosecution for an offence in relation to the ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils.¹

109. All offences under the Ballot Act for which any person may be punished on summary conviction, are appointed to be prosecuted before the sheriff under the provisions of "The Summary Procedure Act, 1864;" and all jurisdictions, powers, and authorities necessary for that purpose are conferred on sheriffs and sheriffs-substitute.²

110. Where a parliamentary burgh and municipal burgh occupy the whole or any part of the same area, any ballot boxes or fittings for polling stations and compartments provided for such parliamentary burgh or such municipal burgh may be used in any municipal or parliamentary election in such burgh free of charge, and any damage, other than reasonable wear and tear caused to the same, must be paid as part of the expenses of the election at which they are so used.³

111. Any person applying for a ballot paper under the Ballot Act is to be deemed "to tender his vote" or "to assume to vote," within the meaning of the act; and any application for a ballot paper under the act is equivalent to "voting." The term "polling booth" as used in the act includes a polling station; and the term "proclamation" includes a public notice given in pursuance of the act.⁴

No person who has voted at an election can, in any legal proceeding to question the election or return, be required to state for whom he has voted.⁵

¹ See section 3 of the Ballot Act.

² See section 16, sub-sections (2) and (3) of the Ballot Act.

³ See section 14 of the Ballot Act.

⁴ See section 15 of the Ballot Act.

⁵ See section 12 of the Ballot Act.

112. No misnomer or inaccurate description of any person or place in any writing made in the form of any schedule to the Act 3 and 4 Will. IV., cap. 76,¹ or in any list or register or notice, or other writing made under authority of that act, in any way prevents or abridges the operation of the act, provided that such person or place is so designated in such writing, list, register, or notice, as to be commonly understood.²

No election can be declared invalid by reason of a non-compliance with the rules contained in the First schedule to the Ballot Act, or any mistake in the use of the forms in the Second schedule to the Ballot Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the act, and that such non-compliance or mistake did not affect the result of the election.³ In other words, no election in which secrecy of voting by ballot, in accordance with the principles of the act, is given effect to, is to be declared invalid reason by of such non-compliance with the rules, or such mistakes in the forms, prescribed by the act, as, in the judgment of the court, did not affect the result of the election.

This provision of the Ballot Act is not to be understood as imposing upon the person who challenges the election the burden of proving that the non-compliance or mistake complained of *did actually affect* the result of the election. Nor can it be held that it imposes upon the person who supports the election the burden of proving that the non-compliance or mistake *did not affect* the result of the election. On the one hand, the challenger may establish such a material departure from the provisions of the act, as to give rise to the presumption that the result of the election may have been affected, and to necessitate the ordering of a new election.

¹ Section 35 of 3 and 4 Will. IV., cap. 76.

² See Nos. 59 and 68 of these Observations.

³ See section 13 of the Ballot Act.

Thus if, as in the Belfast election case in 1842,¹ an insufficient number of polling booths were provided for the election; or if, as in the Hackney Borough election case in 1874,² polling booths were not opened for particular districts, and numbers of electors were deprived of the opportunity of recording their votes, the non-compliance would be held fatal to the validity of the election, without proof as to the number of persons who had been prevented from voting, or the probable result of their not having voted. On the other hand, the challenger might succeed, as in the Greenock Burgh election in 1869,³ in establishing cases of non-compliance or mistake, the nature or extent of which might be such as not to affect the validity of the election. It is quite possible that a certain number of voters may have been improperly prevented from voting, and yet the majority of votes for one of the candidates may have been so great, that it could not possibly be overturned by the votes of all who have been prevented from recording their votes. In such a case, as in that of the Warrington Borough Election in 1869,⁴

¹ Barron and Austen's Election Cases, p. 553.

² Tried by Mr. Justice Grove 15th and 16th April 1874. [L. T., vol. xxx., p. 69. O'M. and H. Reports, vol. ii., p. 77.]

³ See the case of Greenock, tried by Lord Barcaple, 9th February 1869, [O'M. and H. Reports, vol. i., p. 247.]

⁴ Tried by Mr. Baron Martin 4th February 1869. [O'M. and H. Reports, vol. i., p. 42.] In that case, an election was objected to on the ground that confusion existed at one of the polling booths, in consequence of which many voters who had tendered, or intended to tender, their votes in favour of one of the candidates, were not recorded or taken into account. The election judge, however, refused to void the election, observing, "Supposing it happened that the votes of half-a-dozen out of 2000 or 3000 voters are omitted to be taken, are all the other votes to be set aside, and the election declared void? It would be in my opinion ridiculous to say, that because at one booth there was an irregularity, the whole of the rest of the borough should be put to the trouble of a new election, and all that has taken place declared null and void. I adhere to what Mr. Justice Willes said at Lichfield, that a judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside." [O'M. and H. Reports, vol. i., p. 44.] In the Drogheda Borough Election case, tried before Mr.

the court might well hold that the election should not be disturbed.

Probably the only rule that can be safely stated is this, that whensoever compliance with the provisions and rules might have led to a result different from that which actually took place under circumstances of non-compliance, a new election will be ordered; but that when the effect of non-compliance could not, under assumptions most unfavourable to the actual result being maintained, have altered that result, the election will be sustained.¹

Justice Barry on 29th May 1874, the judge referred to the dictum of Mr. Baron Martin above quoted, and said, "The question raised in that case may not be precisely of the same character as the question raised here, but the rule laid down by that eminent judge seems to me to be consonant with justice and with common sense, and to be one of general application." [O'M. and H. Reports, vol. ii., p. 211.]

¹ In the Hackney case above referred to, Mr Justice Grove thus stated his views as to the meaning and effect of the 13th section of the Ballot Act—"If I look to the whole paragraph, and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this—An election is not to be upset for an informality or for a triviality; it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that that is a way of viewing it which is consistent with the terms of the section. So far as it seems to me, the reasonable and fair meaning of the section is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case, to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election. That being my construction of the section, I cannot say, considering the very large number of electors who have been disabled from voting upon the present occasion, that it has been an election which may fairly be taken to represent the voices of the electors of Hackney. Although no doubt it is a matter which one cannot view without some regret, that innocent parties who have expended time and trouble and money in the election should be put to this inconvenience, and that the election should now turn out to be a nullity, I cannot look at the consequences. I am here to pronounce the law to the best of my judgment, and in my judgment, the law fairly applied, both at common law and according to this statute, is that the late election for the borough of Hackney is void.

"I should wish to advert to the point raised by Mr. Patchett as to the rules contained in the First schedule to this Act. My impression is that the evidence in this case certainly does fit the expression in the statute, 'non-compliance with the rules in the First schedule to the Act.' At the same time I think that the words used in the section, 'non-compliance with the rules,' or 'any mistake,' rather mean what I

113. It is provided by section 25 of the Ballot Act, that where a candidate, in any proceedings questioning an election, is proved to have been guilty, by himself or

have already alluded to ; that is to say, something in the nature of mere informalities or mere non-compliance with the rules. It is unnecessary to my decision, and I am far from saying that it is not open to argument, whether the entire absence of accommodation for voters of whole districts was intended by the legislature when they used the expression, 'non-compliance with the rules.' I think that the mistakes here committed do fall within the terms of the 13th section, but I am inclined to think that the object of the 13th section was to guard against mere informalities or irregularities as to the rules, and not to apply, of course, to that which would amount to a substantial disfranchisement of whole districts of the borough. But it is not necessary that I should pronounce an opinion as to whether that is included or not, because, as I have said already, I am of opinion that whichever way it is, whether it applies to non-compliance with the rules or not, it is clear, in my judgment, that if it is to apply, and apply exclusively to the rules contained in the First schedule, this is not such a non-compliance as still leaves the election conducted in accordance with the principles of the act, or leaves it in such a state that it would appear to me that its result was not affected by the non-compliance." [O'M. and H. Reports, vol. ii., p. 85 ; L. T. (N. S.) vol. xxxix., p. 69.]

See the judgment of the Court of Common Pleas in the case of *Northcote v. Pulsford*, 8th May 1875, quoted in the footnote to No. 90 of these Observations, pp. 155-156.

In the case of *Woodward v. Sarsons*, decided by the same court on 9th July 1875, the judgment of the court, which was prepared by Mr. Justice Brett, and read in his absence by the Chief-Justice Lord Coleridge, contained the following statement of the facts, and exposition of the law on the subject :—

LORD COLERIDGE, C.-J.—In this case a petition had been presented, praying that the election of the respondent Henry Sarsons to the office of town councillor should be declared void ; and a case was stated for the opinion of the court.

At the election, the petitioner Woodward, and the respondent Sarsons, were the candidates, and the respondent Sadler was the alderman of the ward and returning officer. The returning officer appointed one Smith to be the presiding officer at polling station No. 130. Upon the electors applying for a ballot paper at such station, the presiding officer marked upon the face of the ballot paper given to each of them the number of the voter appearing on the burgess roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward, and 60 in favour of the respondent Sarsons. The burgess-roll numbers so marked were, in fact, not seen so as to be identified ; but they could have been seen by the persons present at the counting of the ballot papers. At polling station No. 125, about twenty ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box, wrapped up in the declaration of inability to read made by the

by any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election, or where any person retained or employed for reward

voter for whom such vote was marked. Each of the votes so given and so marked by the presiding officer could have been (but was not, in fact) identified by the returning officer at the counting of the votes, by comparing the ballot papers with the declarations of inability to read in which they were wrapped. Twenty-two ballot papers which had been counted as valid were, on inspection after the presentation of the petition, found to be marked in a manner to which objection was now taken. It was contended that they ought all to have been rejected.

The returning officer declared at the election the number of votes thus :—For Sarsons, 965 ; for Woodward, 775—majority for Sarsons, 190 ; and he thereupon declared Sarsons, the respondent, to be duly elected.

The petition, without praying for a scrutiny, prayed that it might be determined that Sarsons was not duly elected, and that the election was void.

Upon these facts, it was argued, on behalf of the appellant, that the election was void, because it had not been conducted in accordance with the Ballot Act ; that it was void on that account according to the common law of Parliament, because the deviation from the act was so great that the election could not be said to be an election by ballot ; that it was void under the Ballot Act itself, according to section 13, because it had not been conducted according to the rules in the schedules nor in accordance with the principles laid down in the body of the act, and the non-compliance with the principles of the act had affected the result of the election ; and, as to the last allegation, it was said that the petitioner was not bound, in order to prove it, to show that on a scrutiny the respondent would be in a minority, but it was enough if he could show that so large a body of electors as those who did vote or who might have voted at the polling station No. 130 were, or might have been, virtually disfranchised.

On behalf of the respondents, it was urged that the admitted error of the presiding officer at the polling station No. 130 was not of sufficient importance to avoid the election at common law, because the election was, notwithstanding such error, substantially conducted as an election by ballot ; that in this case it could be demonstrated that the mistake relied on had not affected the result of the election ; that a breach of the Ballot Act, however extensive, cannot as such avoid an election, for there is no enactment in the act to that effect ; that no such enactment is contained in section 13 ; that it is an enactment to save certain elections, and not to invalidate any ; that it is an enactment of extreme caution, stating as law that which was equally the law before.

Arguments were then gone into as to the alleged validity and invalidity of different classes of votes which had been counted. This was not done as by way of scrutiny, but in order to determine whether the alleged mistakes had or had not affected the result of the election.

The questions raised for decision seem to be—first, what is the true statement of the rule under which an election may be voided by the common law of Parliament?—secondly, is the present case brought within the rule?—thirdly, whether a breach of the Ballot Act can, as

by or on behalf of such candidate, for all or any of the purposes of such election, as agent, clerk, messenger, or in any other employment, is proved on such trial to have

such, be a ground for voiding an election?—fourthly, if yes, can this election be thereby voided?

As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to void it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.* that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of Grove, J., at Hackney (31 L. T. Rep. N. S. 69; 2 O'M. & H. 77, 81), and Dudley (2 O'M. & H. 115, 121), with the judgment of Martin, B., at Salford. (20 L. T. Rep. N. S. 120; 1 O'M. & H. 133, 140), and of Mellor, J., at Bolton (31 L. T. Rep. N. S. 194; 2 O'M. & H. 138, 142), all which judgments are in accordance with, but express more accurately, the grounds of the decisions in Parliament, in the older cases of Norfolk (9 Journ. 631; Heyw. Co. 555), (n), Morpeth (1 Doug. El. c. 147), Pontrefact (1 Doug. El. c. 337), Coventry (15 Journ. 276, P. & Kn. at p. 338; C. & R. at p. 276), New Ross (2 P. R. & D. 188), and Drogheda (W. & D. 206; and 1 O'M. & H. 252, 257), all which are mentioned in Rogers on Elections, 10th edit., p. 365, *et seq.*

As to the second, *i.e.* that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the

voted at such election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been

existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws; it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse-race, it might well have been said that the electors had exercised their free will; but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, when the election is to be an election by ballot, if, either wilfully or erroneously, a *whole constituency* were to vote, but *not by ballot at all*, the election would be a free exercise of their will, but it would not be an election by ballot, and therefore not an election under the existing election law. But if, in the opinion of the tribunal, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament. We agree, upon this point, with the answer attributed to Martin, B., before a Committee of the House of Commons (Minutes of Evidence before the Select Committee on Parliamentary and Municipal Elections, Leigh & Le M. 2d ed. 144, n.) with his decision at Salford (1 O'M. & H. 133), and with the decisions of Mellor, J., at Bolton (2 O'M. & H. 138), and of Barry, J., at Drogheda (2 O'M. & H. 201).

If the rule be as thus stated, then the next question is, whether we can say, upon the facts disclosed in the present case, that a majority of the electors have been, or that there is reasonable ground to believe that a majority may have been, by misconduct or error of the presiding officers, prevented from recording their votes with effect. Now, there is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it by what occurred. All who went to vote at the polling station No. 130 did vote. It was argued that a report of the error being there perpetrated might have prevented others from going to vote; but this was answered by showing that the case finds that no one noticed the error until after the election was over. The result is, that all the electors who desired to vote did vote. And, as to the votes which were given, and which are objected to, it is not known, except as to the twenty, for whom each of them was in fact given. In this case, therefore, when the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt as to whether a majority may or may not have been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred; it will be seen how the majority of those who did vote was affected by such errors.

[Then follows the passage setting forth the principles to be applied in determining the validity of the vote objected to, as quoted and referred to on pp. 136-139.]

It follows from our decision as to the different ballot papers, that if the 60 which were given for Sarsons, but properly disallowed at the counting by the returning officer, had not been rendered void by the

given to such candidate one vote for every person who voted at such election, and is proved to have been so

presiding officer, they would have made the votes for Sarsons 1025; striking from which three disallowed papers in Appendix A., his numbers would have been 1022; and adding the 230 for Woodward, but striking off one disallowed in Appendix B., his numbers would have been 1008. The twenty, being properly in our opinion allowed, do not affect the result.

Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations Nos. 130 and 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and, therefore, that the election cannot be declared void by the common law applicable to parliamentary elections.

But then it is urged that there has been a breach of the Ballot Act, and, therefore, the election is, by virtue of the act itself, void. This was the third question which was raised in argument before us. It is said that sect. 13, though it is in a negative form, assumes as an affirmative proposition, that a non-compliance with the rules, or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the act, and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this—that the non-observance of the rules or forms, which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of voters, or in other words, the result of the election. It, therefore, is, as has been said, an enactment *ex abundante cautela*, &c., declaring that to be the law applicable to elections under the Ballot Act which would have been the law to be applied if the section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute. [L. T. vol. xxxii. (N. S.) pp. 867-873; L. R. (C. P.) vol. x., pp. 733-751; Appendix No. 1 to the Report from the Select Committee of the House of Commons on Parliamentary and Municipal Elections (1876), pp. 109-117.]

The only judge in Scotland who has commented on the 13th section of the Ballot Act is Lord Gifford, the Lord Ordinary, in the case of Hamilton v. The Police Commissioners of Dunoon, 15th January 1875. In that case the returning officer had, to save time, marked all the ballot papers, both on the face and back with his official mark, in his own shop, before the election began. This was one of several irregularities objected to. On these the Lord Ordinary observed—"Some of the irregularities were serious, and it has not been without difficulty that the Lord Ordinary has come to be of opinion that they were not fatal. If it had been shown that any of them, or any of the more material of them, were intentional and in deliberate defiance of the statute, and not mere innocent mistakes, the Lord Ordinary would have annulled the election. But it is quite clear, and indeed was not seriously disputed, that the proved irregularities were the result of innocent mistake or misappre-

bribed, treated, or unduly influenced, or so retained or employed for reward as aforesaid.¹ It has been held, however, in the case of *Macdonald and Others v. Robertson and Others*, 17th May 1876, that the 25th section does not apply to municipal elections,² and that as treating is not a crime at common law, and has not been made a statutory offence in these elections, it is not a relevant ground for setting them aside. The judges reserved their opinion as to the effect of bribery on municipal elections, it being a crime at common law.

hension on the part of those who were conducting the proceedings, and the Lord Ordinary is also satisfied that none of these mistakes or irregularities affected the principles laid down in the Ballot Act, or the result of the election." . . . "The Lord Ordinary is of opinion that the provision of section 13 (of the Ballot Act), and the relative provision in the (General Police) Act of 1862," (to the effect that elections shall not be set aside on technical mistakes or irregularities), "are sufficient to save the election in the present case from nullity, though it must be confessed that some of the irregularities deserve very severe censure. None of them affected the great principle of the Ballot Act—secret voting; and every elector had fair and full opportunity to give his secret vote. The irregularities were in matters of detail. Some of them may have affected particular votes, and might have been important had this been a question of scrutiny, but none of them, in fairness, and according to the reason of the thing, are sufficient to upset the whole election." . . . "It was no doubt very ingeniously urged for the pursuer, that the irregularity in question (the impressing of the ballot papers with the official mark before the commencement of the poll) was not only a violation of the rules in the schedule, but a violation of the Ballot Act itself (section 2), which contains, more shortly expressed, many of the rules contained in the schedule. It was argued that section 13 may save violations of the rules, but not violations of the act itself. The Lord Ordinary thinks this is much too strict a reading. Undoubtedly the thing done was a contravention of the 'rules,' and as such it is saved by section 13, although it also occurs in the statute. The 'rules' are expressly declared parts of the statute, and it seems out of the question to hold that the non-strict compliance with everything in section 2 must, without any discretion in the court, absolutely void every election." In the Inner House the question was not entered on, the Lord President, with whom the other judges concurred, holding that under the conclusions of the summons, the nullity of the whole election could not be considered. But he concluded his opinion with this significant remark—"I may say that I concur with the Lord Ordinary that the way in which Mr. Smith (the returning officer) dealt with stamping the ballot papers was a very serious irregularity. Whether or not it would be sufficient to void the election I do not say." [Session Cases (Fourth Series) vol. ii., p. 299; Scottish Law Reporter, vol. xii., p. 257.]

¹ See section 25 of the Ballot Act.

² *Macdonald and Others v. Robertson and Others*, 17th May 1876. [The Scottish Law Reporter, vol. xiii., p. 426; Court of Session Cases

(9.). *Declaration of the Election, and Proceedings till the Council has been completed.*

114. If the examination and counting of the votes given for the respective candidates in the several wards in which the elections were contested, can be previously completed, in the manner before described, the returning officer must, between the hours of twelve and two o'clock of the Wednesday immediately succeeding the election, declare upon whom the election has fallen by the

(Fourth Series), vol. iii., pp. 645-651.] "In that case an election of commissioners in the police burgh of Maryhill was challenged, *inter alia*, on the ground that the defenders by themselves, or others acting on their behalf, treated voters with the view of influencing their votes, at a public-house specified, and at other hotels and public-houses in Maryhill, and kept a free table therein for treating voters during the whole of the polling day; and that a large number of voters who were so treated, and unduly influenced, voted at the election in favour of the defenders. The Lord Ordinary (Young) assoilzied the defenders, holding that there was no authority to support the objection, and his decision was affirmed by the First Division of the Court. In referring to this objection the Lord President said:—"The third and last objection rests on the allegation of treating voters. It is the first time I ever heard of such an objection to a municipal election or elections of that class. We are familiar with the objection in parliamentary elections, but there it is dealt with by statutory enactment. But I cannot find anything of the kind in regard to municipal elections. The 25th section of the Ballot Act is confined to parliamentary elections. I do not say that an election of this kind could not be set aside on the ground of bribery. Bribery is a crime at common law. Treating is a statutory and constructive bribery not known to common law, and we have no authority for extending the law as to treating in parliamentary elections to municipal elections." Lord Deas said:—"The third objection is that the defenders treated the voters. I entirely agree with your Lordship on this point. If there had been a relevant allegation of bribery, we might have inquired into it. Bribery is a crime at common law. Treating is not. Treating to food is not a crime at all. As to drink it is not said that the electors were made drunk, or even that they were treated to drink. It is out of the question that the election should be set aside on such lame allegations." Lord Ardmillan said:—"I do not think that we could have a proof of the pursuer's allegations of treating. Bribery would have been a different matter. Here there are no special and definite averments. There is no allegation of any particular person or persons having been treated. The charge is made at random, and is altogether indefinite. If it were seriously alleged that any persons were treated or unlawfully influenced, their names ought to have been given."

majority of votes.¹ If the examination and counting of the votes cannot be concluded before two o'clock on that day, then the declaration must be made as soon as these operations are completed.² In any case, the declaration should be made in the town house or council chamber, or other public building of the burgh.³

115. When an equal number of votes has been given for two or more candidates in one ward, the returning officer must declare the fact, and so make what is termed "a double return." When an equality of votes is found to exist between any candidate at a parliamentary election, and the addition of a vote would entitle any of such candidates to be declared elected, the returning officer, if a registered elector of the county or burgh in which the election takes place, may give such additional vote, but must not in any other case vote at an election for which he is returning officer.⁴ That provision is expressly declared, however, not to apply to municipal elections.⁵ The returning officer has, therefore, no power to give a casting vote in such elections.⁶

116. At the meeting for declaring the election, the town clerk should submit to the returning officer a certificate narrating the publication of the notice specified in No. 34 of these Observations;⁷ the nomination of the candidates and the publication of their names as specified in Nos. 35,

¹ See 3 and 4 Will. IV., cap. 76, section 10; 3 and 4 Will. IV., cap. 77, section 8; the Ballot Act, 1872, section 2, and rules 32 and 35 of that act.

² See Memorial and Opinion, Appendix XV., pp. [167], [169], and [185.]

³ See footnote 1.

⁴ See section 2 of the Ballot Act, and opinion of Mr. A. R. Clark and Mr. Watson, referred to in the footnote to No. 75 of these Observations.

⁵ See section 20, sub-section 7 (a).

⁶ See section 10 of the Act 3 and 4 Will. IV., cap. 76; section 9 of "The Municipal Elections Amendment (Scotland) Act 1868;" and section 3 of "The Municipal Elections Amendment (Scotland) Act 1870."

See section 2 of the Ballot Act.

⁷ See form of certificate, Appendix XVI., No. 26, p. [217].

36, 39, and 42 of these Observations ; and the public notification of the fact that no poll would take place in those wards in which the number of candidates nominated did not exceed the number of vacancies to be supplied, as specified in No. 43 of these Observations. This certificate being read, the provost or chief magistrate should declare that, as respects those wards in which the number of candidates named does not exceed the vacancies to be supplied, the person so nominated has been duly elected, in terms of "The Municipal Elections Amendment (Scotland) Act, 1870."¹ He will then immediately give, or cause to be given, notice in writing to the several persons elected of their election, and require them severally to appear in the town hall, council chamber, or other public room of the burgh, at a specified hour on the Thursday immediately after the election, when they must severally declare whether they accept or decline to accept the office of councillor.²

117. On the Thursday immediately following the election, accordingly, the provost or chief magistrate and the town clerk must attend at the appointed place and hour, and require each of the newly elected councillors who is present,³ to declare whether he accepts or declines to accept office.⁴ The allegation that a person so elected does not possess the qualification required for a councillor, accompanied even by a tender of proof of the disqualification, will not justify the provost or chief magistrate in delaying to call upon the person elected to declare his acceptance or declinature of office.⁵

¹ See form of the declaration by the provost or chief magistrate as to the persons elected councillors and trustees, Appendix XVI., No. 27, pp. [219], [220].

² See section 10 of the Act 3 and 4 Will. IV., cap. 76.

See form of intimation to the councillors elected of their election, Appendix XVI., No. 28, p. [220].

³ See No. 118 of these Observations.

⁴ See section 10 of the Act 3 and 4 Will. IV., cap. 76.

⁵ A question having been raised on this point in Edinburgh, in November 1860, the opinion of Mr. George Young was taken for the town council. In that opinion, which was to the effect stated

118. If any newly elected councillor fails to attend, he must be held to have declined to accept office, unless he transmit to the meeting a sufficient written explanation signed by himself or his agent, of the cause of his absence, and intimating his acceptance,¹ and unless he at the same time produce evidence of his being a burghess of the burgh, if there is in it a body of burghesses.² Failure of any councillor to produce evidence of burghess-ship, vacates his election in the same way as if he had declined to accept.³ In practice, a statement by the town clerk, as the custodier of the register of burghesses, that the person so elected is a burghess is all that is required.⁴

in the text, Mr. Young added,—“The duty of the presiding magistrate is, in my opinion, merely magisterial, and requires him to declare the state of the vote, and proceed otherwise according to the statute, without regard to any such objection to the qualification of a candidate as that which is here indicated.”

¹ See section 13 of the Act 3 and 4 Will. IV., cap. 76 ; and section 10 of the Act 3 and 4 Will. IV., cap. 77.

² See No. 123 of these Observations.

³ See Section 14 of the Act 3 and 4 Will. IV., cap 76, and section 20 of the Act 3 and 4 Will. IV. cap. 77, as amended by the Act 23 and 24 Victoria, cap. 47.

⁴ A question was raised in Edinburgh, in November 1840, as to the necessity for newly elected councillors producing formal evidence of burghess-ship, and it was protested that their failing to do so had vacated their election. The circumstances were these,—Twelve new councillors had been elected, and appeared and intimated their acceptance of office. Of these eight had been members of the council during the immediately preceding year, or at a former period, and the presiding magistrate was personally aware of the fact that they were burghesses. The remaining four had not previously been members of council. The question was put to each person elected whether he was a burghess, and he replied in the affirmative. The accuracy of the statement was known to the town clerk, and the presiding magistrate was satisfied. Formal evidence of the fact was not accordingly required. Thereupon the whole newly elected councillors were sworn into office. On the following day, two councillors who had been present at the induction, but had then offered no objection, and four qualified electors of the burgh, served a protest upon the presiding magistrate against the election being held valid, and required him under statutory penalties to appoint a new election. In these circumstances, the then Lord Advocate (afterwards Lord Rutherford) and Mr. Duncan M'Neill (afterwards Lord Colonsay) were consulted as to whether it was necessary or competent for the presiding magistrate at that stage of the proceedings to comply with the requisition so served upon him. Their opinion was given in the following terms,—“We are clearly of opinion that the memorialist is not bound, and that he ought not to comply with the requisition.”

See form of minute, Appendix XVI., No. 29 (1), p. [221].

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See form of minute, Appendix XVI., No. 29 (1), p. [221].

119. When two or more councillors were elected by open poll or by ballot, for a burgh, or for any ward of a burgh which is divided into wards, and when the several councillors had not an equal number of votes, the practice in Edinburgh, Glasgow, and other burghs, has been to require the declaration of acceptance of office from the councillors so elected, in the order of the number of votes given for each—the councillor who had the fewest number of votes accepting first, then the councillor who had the next highest number, and so on. Thereafter the statutory declarations or declaration¹ were administered to each, and he took his seat as a councillor in the order in which he had accepted office. The councillor having the fewest number of votes was held to be thus inducted before the councillor who had a larger number of votes, and in determining the order in which the several councillors had to retire from the council, the first inducted was held to have been longest in office. By this arrangement effect was given, or was intended to be given, to the principle recognised by the Acts 3 and 4 Will. IV., cap. 76, section 16; and 3 and 4 Will. IV., cap. 77, section 12, as regarded the order in which the third of the councillors elected at the first election under these acts, were to retire in 1834 and 1835, and also to the enactment of these acts that, as regarded all subsequent elections, the retiring third should “always consist of the councillors who have been longest in office.” So far at all events as the practice was followed, no question could arise as to the rotation in which the councillors afterwards had to retire from the council. It has been held, however, in the case of *Thomson v. the Magistrates of Rutherglen*, 17th February 1876,² with reference to a municipal election in the burgh of Rutherglen,—in which burgh the above practice was not observed,—that under the 16th section of the Act 3 and

¹ See No. 120 of these Observations.

² Court of Session cases (fourth series) vol. iii., pp. 451-460. The Scottish Law Reporter, vol. xiii., pp. 293-299.

4 Will. IV., c. 76, taken in connection with the 3d section of "The Municipal Elections Amendment (Scotland) Act 1870," where there is not a sufficient number of councillors who have been three years in office to constitute one-third of the council to go out, the deficiency must be made up by selecting from the next younger class of councillors; and that the principle of selection is to be this, that the member or members of council must be taken from that younger class who had the smallest number of votes, and in a case of equality of votes, or no contest, if only one is wanted, the majority of the council are to decide.¹

¹ The ground of that judgment is thus stated by the Lord President (Inglis): "The 16th section of the Statute provided that in 1834 (the first year after the act came into operation) the third to go out should 'consist of the councillors who had the smallest number of votes at the election of councillors' in 1833. And, farther, that in the following year (1835) 'the third of the councillors first elected under the act who shall go out, shall consist of the councillors who, at such first election under this act, had the next smallest number of votes, the majority of the council always determining, where the votes for any such person shall have been equal, who shall be the person to retire;' and thereafter, that is, in 1836 and subsequent years, 'the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office.' Now, all this is plain enough so far. At the second election, in 1834, the one-third going out were those who had the smallest number of votes at the first election in 1833. At the third election, in 1835, the one-third going out were those who had the next smallest number of votes at the first election in 1833. Then, if everything kept its normal course, according to the defender's theory, it would follow that in 1836 the remaining one-third would go out. But that is not what the Statute provides. It includes the remaining one-third in its general provision for the future, that 'the one-third so annually going out of office shall consist of the councillors who have been longest in office.' Now, it might very well happen that in 1836 the remaining one-third of those elected in 1833 were no longer all in office. Deaths or resignations might have occurred which could not be counted as equivalent to going out of office in 1836. Supposing that to have been the state of matters in 1836, what would have been the proper course to take then? If only three remained to go out of the six who had been elected in 1833, where would you have found the other three? Evidently they could only be found in the remainder of the council who had not been so long as three years in office. The question is, how are you to select among them who are to be, so to speak, the victims? Nothing is suggested in the Statute as a criterion, except the number of votes at election. And yet, in the Statute itself, that criterion is expressly applied only in the case of the elections of 1834 and 1835, and nothing is said about it

In view of that decision, it is now immaterial in what order councillors accept office, or take the declaration *de fidei administratione*, or are inducted; but it is, of course, unnecessary to make any change upon the previous practice, as above explained, which led to the same result.

When any one of the newly elected councillors is absent, but has intimated his acceptance in writing, such acceptance should be read and minuted at that stage in the proceedings at which, if present, he would have been called on to declare his acceptance. When councillors

with reference to any future year. But it is argued that the terms of the Statute are 'the third of the councillors so going out,' and that the word 'so' implies that the mode of selecting who shall go out, if selection is necessary, shall be as provided with reference to the years 1834 and 1835, in accordance with the number of votes.

"Now, I should have had great difficulty in adopting that interpretation if it were not for subsequent legislation. But the statute passed in 1870 (33 and 34 Vict., c. 92), to amend the law as to municipal elections, throws light on the subject. It must be kept in view, in the first place, that under the Act 3 and 4 Will. IV., c. 76, no one could be elected without being voted for, either by means of signed lists or by a poll being taken. Even where there was no contest the councillors elected still came into office with a certain number of votes. The intermediate statute (the Municipal Elections (Scotland) Act, 1868, 31 and 32 Vict., c. 108) can hardly be said to touch the question, except that it provides for notice being given of the names of those who are to be put in nomination. But the Act of 1870, by section 3, makes a provision that when the number of persons nominated does not exceed the number of vacancies to be filled up, there is to be no poll, and the persons nominated are simply to be declared duly elected. Consequently, in such cases there will be no voting, and the persons thus elected will come in, not in virtue of the votes they have received, but by reason of there being no opposition. This being a novel situation in the history of municipal elections, it is provided for by section 5 of the act, which declares 'that, where in any burgh or ward two or more councillors have been elected on the same day under the provisions of this act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the Town Council (including the councillors so elected) shall determine the order in which the councillors so elected shall retire.' Now, that is a very important enactment in reference to the matter before us, because it assumes, in the first place, that persons elected on the same day may go out at different times; and, in the second place, that if the persons so elected on the same day came in with unequal votes there is no difficulty as to the order in which they shall go out. For it is only in the case of no contest or of equality of votes that the majority of the council is to determine. Suppose, for instance, that of two councillors elected in November 1873, one had a larger number of

have been elected without a poll, or by equality of votes, it is immaterial in what order they declare their acceptance, or take the declaration *de fidei administratione*, as the order of their retirement has to be fixed by the council.¹

120. Previous to the passing of the Promissory Oaths Act, 1868 (31 & 32 Vict., c. 72), it was the practice to administer to all newly-elected councillors the oaths or declarations of allegiance, supremacy, and abjuration, and *de fidei administratione officii*. But since then, councillors are only required to take the declaration *de fidei administratione*.² That declaration may be administered at this meeting to those councillors who are present and accept office; and if any councillors are not present, the declaration will be administered to them at the first meeting of

votes than the other, and one is wanted to retire in 1875 to make up the proper number of retiring councillors, the section does not provide for that case, because it plainly assumes that it is provided for already. Where, therefore, there has been an election by votes, and the number of votes by which the different councillors have been elected is unequal, then the test of number of votes is the test to be applied to determine the order in which they are to retire.

“I come, therefore, to the conclusion that section 16 of the Act 3 and 4 Will. IV., c. 76, is to receive this effect, that where, as in the present case, there is not a sufficient number of councillors three years in office to constitute the one-third of the council to go out, you must make up the deficiency by selecting from the next younger class of councillors; and that the principle of selection is to be this, that you are to take the member or members from that younger class who had the smallest number of votes, and, in a case of equality of votes, or no contest, if only one is wanted, the majority of the council are to decide.”

¹ See Nos. 141, 143, 144 of these Observations.

² In October 1868, Mr. John M'Laren, advocate, was consulted by the magistrates of Edinburgh as to the oaths or declarations which, under the Promissory Oaths Act, 1868, should be administered to magistrates, councillors, members of the Dean of Guild Court, city officials, and others, on accepting office, and he returned the following opinion:—“In my opinion, section 9 of the Promissory Oaths Act, 1868, makes it *illegal* to tender the oaths of allegiance, supremacy, and abjuration, or to tender the shorter form substituted for these oaths by the statute, or a declaration to the like effect, to any of the persons above enumerated. They are not now required to promise allegiance to the Crown in any shape or form. I am further of opinion that section 12 (sub-section 4) applies only to the oath *de fidei administratione officii* and other oaths of office. Its effect is to substitute a declaration for such oaths. It has no application to the oaths of allegiance.”

council at which they are present, before they take their seats as councillors.

121. The validity of the election of a town councillor, whose induction into office has not been completed, may be tried in the form of a suspension.¹ It is not competent to proceed by way of petition and complaint² under the provisions of 7 Geo. II.; cap. 16, and 16 Geo. IV., cap. 11.

122. The question as to what constitutes induction into office as a councillor must, be determined in the royal burghs dealt with by the Act 3 and 4 Will. IV., cap 76, with reference to the provisions of section 14 of that act, as affected by the Act 23 and 24 Victoria, cap. 47, to the extent explained in the immediately succeeding Observation, and in parliamentary burghs with reference to the provisions of section 20 of the Act 3 and 4 William IV., cap. 77. Both of these sections enact that no person shall be “received and inducted as a councillor who shall not, *previous to such induction*, be entered a burgess of the burgh for which he is so elected,” wherever there is any body of burgesses in such burgh, and produce, “*when he declares his acceptance*, the evidence of his being such burgess;” they also provide that no merely honorary burgess shall be entitled to be “so inducted.” Admission as a burgess must thus precede induction, while evidence of burgessship must be produced when office is accepted. This is all that these statutes prescribe. Is anything more necessary? Must the person elected take the declaration *de fidei administratione*; and is his induction completed when he has done so, but not till then? The question was raised in Edinburgh in October 1841, when the then Dean of Faculty (afterwards Lord Wood) and Mr Adam Anderson (afterwards Lord Anderson) were consulted, and expressed an opinion “that the

¹ Monteith v. M'Gavin, 29th Nov. 1837, 16 S. 122; 13 F. 118. In this case the bill of suspension was intimated before the person elected had declared his acceptance of office.

² Thomson and others v. The Magistrates of Wick and others, 8th July 1836, 14 S. 1148; 11 F. 912.

intimation of acceptance by an absent councillor, accompanied with the evidence of his being a burgess, is to be held as equivalent to induction, although the oaths of office are not administered to him till a subsequent day." It is worthy of notice, however, that in the case of *M'Culloch v. Hill* and others the election of certain persons as bailies was held not to be completed till they took the oaths of allegiance and *de fidei administratione*, and assumed the seats of office.¹ No oaths are now administered to councillors.

123. By section 14 of the Act 3 and 4 Will. IV., cap. 76, and by section 20 of the Act 3 and 4 Will. IV., cap. 77, it was enacted that every person elected under the provisions of these acts respectively should be forthwith entitled to be entered as a burgess, and thereafter to be received and inducted as a councillor, on payment of the ordinary fees.² The 14th section of the Act 3 and 4 Will. IV., cap. 76, was, however, repealed by the Act 23 and 24 Victoria, cap. 47, in so far as inconsistent therewith;³ and various provisions were substituted in regard to the admission of persons to be burgesses in royal burghs. The 20th section of the Act 3 and 4 Will. IV., cap. 77, is still operative, except in so far as it, equally with the Act 23 and 24 Victoria, cap. 47, is affected by the provisions of 39 Victoria, cap. 12, which applies both to royal and parliamentary burghs.

By section 2 of the Act 23 and 24 Victoria, cap. 47, the magistrates and council of every royal burgh are empowered to admit any person entitled to vote in the election of a councillor for the burgh to the status of a burgess, and that by a minute of the council, and on payment of such entry money, not exceeding one pound, as they may fix from time to time, which entry money

¹ *M'Culloch v. Hill*, 22d February 1839; 1 D. 549; 14 F. 619.

² See the Acts 1503, caps. 41 and 31; Acts of the Parliaments of Scotland, vol. ii., pp. 245, 252. See also section 14 of the Act 3 and 4 Will. IV., cap. 76, and section 20 of the Act 3 and 4 Will. IV., cap. 77.

³ Section 1.

must be accounted part of the common good, and be applied accordingly. Every person entitled to vote in the election of a councillor is, on being elected a councillor, eligible to be inducted, if before induction he is so admitted a burgess. But such admission by minute of council does not *per se* give or imply any right or title to or interest in the properties, funds, or revenues of any of the guilds, crafts, or incorporations of the burgh, or any mortifications or benefactions for behoof of the burgesses of such guilds, crafts, or incorporations, or of their families, or any right of management thereof, or any membership in any of such guilds, crafts, or incorporations.¹

¹ The effect of the Act 23 and 24 Victoria, cap. 47, is illustrated in the case of the royal burgh of Lauder. In that burgh there were, in 1872, 168 electors, only about 42 of whom were burgesses. In practice only such persons were eligible for admission as burgesses who had previously acquired one or other of the 105 portions of land within the burgh known as the "Burgess Acres," each of which cost from £175 to £350. The son or son-in-law of a burgess paid no entry-money on admission, but others had to pay to the common good an entrance fee, which for many years had been fixed at £30. Admission as a burgess conferred exclusive valuable rights over an extensive common, the right of property in which, as well as the controlling power and right of management "for the benefit of the community and burgesses," was found by the Court of Session [Magistrates of Lauder v. Spence, 17 May 1821; 1 S. 17, (N. E. 15)], to be vested in the magistrates and council, "subject always to and consistent with the rights and titles of the respective parties." In that position of matters, it was obviously the interest of the burgess class to exclude from the town council, and from the management of the town's common, all who had not become burgesses in conformity with the ancient custom. In anticipation of the questions which might thus be raised under the Act of 23 and 24 Victoria, c. 47, the town council, in October 1872, consulted Mr. A. R. Clark and Mr. Watson, and received an opinion on the following points as under:—

Qy. 1. Can persons elected councillors, though not burgesses at the time of election, insist on being admitted burgesses of the burgh; and will the town council be bound to admit them to the status of burgesses, in order to their induction as members of the council?

Ans. 1. It appears to us that, under the provisions of 3 and 4 Will. IV., c. 76, and 23 and 24 Vict., c. 47, a non-burgess elected to be a councillor is entitled, upon payment of a sum not exceeding £1, to be admitted to the status of a burgess, to the effect of enabling him to take his seat at the council board and to act as a member of the council.

Qy. 2. Assuming that the town council were willing to admit the elected non-burgesses to the status of burgesses, would it be competent for them to do so between the first Tuesday of November, when one-third of the council go out of office, and the time when the full number of the council shall have been completed by the annual election?

The Act 39 Victoria, cap. 12,¹ enacts that every person² of full age, liable to be rated for the relief of the poor, who, at the term of Whitsunday 1876, or at any succeeding term of Whitsunday, has occupied any house, warehouse, counting-house, shop, or other building within any burgh in which there are burgesses, during the whole of that year and of the two preceding years, and who, during the term of such occupation, has been an inhabitant householder³ within the burgh, and who has been rated⁴ in respect of such premises to all rates made for the relief of the poor of the parish in which the premises are situated, during the time of his occupation, and who has paid,⁵ on or before the last term of Whitsunday, all such rates, together with all burgh rates,⁶ if any, as have become payable in respect of the premises, except such as have become payable within six calendar months previous to the last term of Whitsunday, shall, subject to the conditions after referred to, be a burgess of the burgh so long as such person occupies premises, and is rated, and pays rates within it in manner aforesaid. The premises in respect of the occupation of which any person has been so rated need not be the same premises, or in the same parish, but may be different premises in the same parish or different parishes. No person being an alien, or who, within twelve calendar months immediately previous to the last term of Whitsunday, has received parochial relief,⁷ or any pension or charitable allowance⁸ from the town council revenues, or from any corporate body within the burgh, can, by virtue of this act, be held to be a burgess so long as he continues to receive such

Ans. 2. In our opinion, the enactments in question do, by necessary implication, confer upon the remanent members of the council power to admit as burgesses councillors duly elected, but who cannot be inducted until they have been admitted to the status of burgess in terms of the statute.

¹ Section 1.

² See footnote (2), p. 209.

³ See footnote (4), p. 210.

⁴ See footnote (6), p. 210.

² See footnote (1), p. 209.

⁴ See footnote (3), p. 209.

⁶ See footnote (5), p. 210.

⁸ See footnotes (7) and (8), p. 211.

pension or charitable allowance. But no person is disqualified from being a burgess by reason that any child of such person has been admitted and taught in any endowed school. Nothing contained in the act interferes with any law or legal usage by which burgesses were previously admitted, or confers any right or title to or interest in the properties, funds, or revenues of any of the guilds, crafts, or incorporations of the burgh, or to or in any burgess acres or grazing rights connected therewith, or mortifications or benefactions for behoof of the members of such guilds, crafts, or incorporations, or of their families, or any right of management thereof, or any membership in any of the said guilds, crafts, or incorporations, or of such burgess acres. The widows and children of burgesses admitted under this act, and who die during the period of their burgess-ship, enjoy the same rights and privileges as those enjoyed by the widows and children of simple burgesses admitted in any other manner.

It would appear that persons who are elected councillors, and are able to establish their claim to burgess-ship under the provisions of the Act 39 Victoria, cap. 12, are entitled to be inducted without becoming burgesses under the old law and practice, or in the manner provided by the Act 23 and 24 Victoria, cap. 47. All claim to burgess-ship under the Act 39 Victoria, cap. 12, must, however, be instructed by evidence that the claimant possesses the several qualifications which the statute prescribes as conditions of burgess-ship.¹ But what is to be the result if a

¹ In July 1876 the Town Council of Edinburgh consulted Mr. Watson and Mr. Balfour as to the meaning and effect of the Act 39 Victoria, cap. 12, and specially on the following questions: (3) "In the absence of any provision for a register of statutory burgesses (*i.e.* burgesses under the act), how are the claims of persons claiming benefit in that capacity to be instructed? and (5) Will it be necessary for persons elected councillors to qualify according to the provisions of the Act 23 and 24 Victoria, cap. 47, or will it be sufficient that they instruct that they are statutory burgesses under the Burgess (Scotland) Act?" To these questions the following answers were given. "(3) The claim would require to be instructed by evidence that the person in whose right it was made possessed the various char-

councillor who becomes a burgess, neither under the old law nor under the Act 23 and 24 Victoria, cap. 47, but under the Act 39 Victoria, cap. 12, loses the statutory qualification? The act declares that burgess-ship acquired under its conditions shall only subsist so long as these conditions continue. Would the loss of qualification be "disability" in the sense of the Acts 3 and 4 Will. IV., cap. 76, sec. 25, and 3 and 4 Will. IV., cap. 77, sec. 23? It might, no doubt, be contended that having produced evidence of burgess-ship before induction he had complied with the requirements of the statute, but burgess-ship under the law as it existed previous to 39 Victoria, cap. 12, was permanent; at all events it existed till recalled by the council for some violation by the burgess of the conditions of his burgess-ship. Under the last-named act it is not so, and assuming that the object of the statutes of 3 and 4 Will. IV., cap. 76, and 3 and 4 Will. IV., cap. 77, was to secure that every councillor of royal and parliamentary burghs in which burgesses existed should, according to the ancient constitution of burghs, be burgesses, and that loss of qualification under these acts constitutes "disability," in the sense and for the reason explained in No. 177 of these Observations, it might be held that the loss of burgess-ship obtained under the Act 39 Victoria, cap. 12, would involve the "disability" of the councillor, and so create a vacancy in the council. To avoid all question on the subject, it will be prudent to

acteristics necessary in order to constitute the statutory qualification (*i.e.* occupied premises and paid rates as required by the statute)." And "(5) We are of opinion that persons who are statutory burgesses, under the act of 1876, will not, if elected councillors, require to qualify in terms of the provisions of the Act 23 and 24 Victoria, cap. 47, the provisions of sec. 2 of the last mentioned act being in our view applicable only to the case of persons who do not already possess a burgess qualification."

It may be added, though it does not affect the point under consideration, that there Mr. Watson and Mr. Balfour were of opinion that "statutory burgesses are not, as such, entitled to claim admission as guild brethren of the city. To allow them so to claim would, in our judgment, be against the spirit and just construction of section 2 of the act."

make all newly elected councillors burgesses under the old law and practice, if they have not been made burgesses in that way previous to their election.¹

¹ The object of the Act 39 Vict., cap. 12, was to assimilate, to some extent, the law of Scotland as regards the creation of burgesses to that of England, without interfering with the old law and practice of Scotland relative to the admission of burgesses otherwise. The systems of the two countries are still, however, essentially different.

The municipal franchise in England, and the machinery for determining it, are prescribed by the Municipal Corporation Act, 5 and 6 Will. IV., cap. 76, amended by various acts, and specially by the Act 32 and 33 Vict., cap. 55. Under these statutes, every person of full age who has occupied any house, warehouse, counting-house, shop, or other building within the borough, during the whole of the preceding twelve calendar months, and who, during the time of such occupation, has resided within the borough, or within seven miles of it, and is enrolled in the manner therein prescribed, is a burgess of such borough, and a member of the corporation. He cannot be so enrolled, however, unless he has been rated in respect of the premises occupied by him within the borough to all poor rates within the parish wherein his premises are situated, and has, previous to 20th July, paid all such rates, and all borough rates payable by him in respect of his occupancy up to the preceding 5th of January. The premises may consist of separate occupancies in different parishes. No alien can be enrolled, neither can any person be enrolled in any year, who, within twelve months previous to the last day of July, has received parochial relief or other alms. No person, moreover, can be enrolled a burgess for the purpose of enjoying the rights conferred for the first time by the Act 5 and 6 Will. IV., cap. 76, in respect of any title other than by occupancy and payment of rates within the borough.

Provision is made for having an accurate roll of burgesses annually prepared. The overseers of the poor in every parish wholly or partly within the borough, make out, sign, and deliver to the town-clerk an alphabetical list, called "The Burgess List," of all persons entitled to be enrolled in the burgess roll of the year. These lists are printed and made public. Persons omitted from the list may claim to be enrolled, and persons enrolled may object to the retention on the roll of persons who have been inserted. These lists of claims and objections are published, and afterwards the lists are revised and corrected in open court by the mayor, and by assessors annually elected by the burgesses. The revised burgess lists are afterwards delivered to the town-clerk, by whom they are copied into one general alphabetical list—which forms the *Burgess Roll*—of the burgesses of the borough entitled to vote in the choice of councillors, assessors, and auditors of the borough.

The burgess roll in English boroughs is thus equivalent to the register of municipal electors in Scotland, and the legislature has provided for both being accurately made up. But the register of municipal electors is quite distinct from the roll of burgesses in Scotland.

Burgess-ship in Scotland, under the provisions of the Act 39 Vict., cap. 12, confers no right of voting in municipal elections, and before it can be acquired for the purpose of obtaining the benefit of such educational and other endowments or advantages as have been provided for burgesses, or the descendants of burgesses, the possession of the pre-

124. In the event of any councillor being elected for two or more wards, he must, at the meeting referred to in No. 117 of these Observations, state for which

scribed statutory qualifications will have to be instructed. But the act contains no machinery by which this can be done in Scotland, as it is done in England by the Municipal Corporation Act.

By whomsoever or in whatsoever way the possession of the qualifications prescribed by the Act 39 Vict., cap. 12, is to be ascertained, however, the identity of much of its phraseology with that of the English Act 32 and 33 Vict., cap. 55, will doubtless lead to a consideration of the decisions of the English courts in regard to the latter act. Meanwhile a few observations suggest themselves.

(1.) The Act 39 Vict., cap. 12, applies to "every *person* of full age." This would seem to extend to women, and to remove any disqualification which might otherwise have been held to exist by reason of *sex*, though not by reason of coverture. In England, accordingly, unmarried women, if otherwise qualified, may vote at municipal elections, but married women may not. [*The Queen v. Harrold*, 22d January 1872, L. R. (Q. B.) vol. vii. p. 361.]

In Scotland, a female cannot exercise the function of voting for a member of parliament, [*Brown v. Ingram*, 19th December 1868, *Macpherson*, vol. vii. p. 281], and she is consequently excluded from voting in municipal elections. Nor can she claim to graduate at the University of Edinburgh. [*Blake v. the Senatus*, 28th June 1873, M'P. vol. xi. p. 784.] In 1873, Mr. A. R. Clark gave an opinion as regarded School Board elections, that "married women are not entitled to vote, being subject to legal disqualification, inasmuch as they are under the curatory of their husbands." But, in July 1876, Mr. Patrick Fraser, Sheriff of Renfrew and Bute, reversing the decision of one of his substitutes, sustained the votes of married women in the Lochwinnoch School Board election. In his note to that judgment he referred to the decisions in the cases of *Brown* and *Blake*, and observed,—The first of these decisions went upon the ground that the exercise of the elective franchise with reference to members of parliament had been restricted by the consuetudinary law of the country to males; and the second went upon the construction of the university charters, and the practice of centuries which had followed upon them. But a new act of parliament, such as the statute dealing with education, is one where the construction of general words is in no way hampered by reference to prior usage, nor in this case is it by the nature of the duty or function to be exercised. [*Ramsay v. Craig*. Reported in *Poor Law Magazine*, New Series, vol. iv. p. 435, and *Journal of Jurisprudence* for 1876, p. 483.]

(2.) As to what constitutes an "inhabitant householder," see *Rogers on Elections* (12th edition), pp. 107-110; *Nicolson on Elections in Scotland*, pp. 92-94; and *Nicolson's Analysis of Scotch Reform Act*, 1868, pp. 4-5.

(3.) As regards rating, it seems to be established in England that in order to constitute a good rating, the name of the person intended to be charged must appear on the rate roll. [See *Moss v. Overseers of Lichfield*, 22d November 1844, *Law Journal* (N. S.) 14, C. P. 56; 1 *Barron and Arnold's Election Cases*, 330; 7 *Manning & Granger's, Common Bench*, 72; *Lutwyche's Registration Appeal Cases*, 184. See also Lord Mansfield's reasons in the judgment in *The King v. St. Luke's*

ward he elects to serve, and thereupon the presiding magistrate will immediately appoint a new election to supply the vacancies in the other ward or wards

Hospital, 7 November 1760; 2 Burrow's Settlement Cases, 1053; Elliot on Registration, (2d Ed.) p. 190]. If the name does so appear, however, that is sufficient, though the rate be appealable [*Pariente v. Lockett*, 29 January 1846, 15 L. J. (N. S.), C. P. 83; 1 Barron and Arnold's E. C. 700; 2 Common Bench Reports, 197; 1 Lutwyche's Regn. Ap. Cases, 441], though no figures are carried out, and though the subject of the rating be inaccurately described [*Cook v. Lockett*, 29 January 1846, L. J. (N. S.) 15 C. P. 78; 1 Barron and Arnold's E. C. 647; 2 C. B. Reports, 168; Lutwyche's Regn. Ap. Cases, 432.]

(4.) Payment of rates must be by the party's own act, as distinguished from payment by a person acting without the authority of the person liable. [*The Queen v. the Mayor of Bridgnorth*, 29 April 1839, L. J. (N. S.) 8 M. C. 86; 2 Perry and Davison's K. B. 317; 10 Adolphus and Ellis, Q. B. 66; *Moger v. Escott*, 9 February 1872, L. R. 7 C. P. 158]. Payment by a landlord for a tenant who has to pay an additional rent in consequence has been sustained. [See *Wright v. the Town Clerk of Stockport*, 6 December 1843, L. J. (N. S.) 13 C. P. 50; 1 Barron and Arnold's E. C., 39; 5 Manning and Granger's C. B., 33; *Hughes v. Overseers of Chatham*, 13 and 16 November and 6 December 1843, L. J. (N. S.) 13 C. P. 44; 1 Barron and Arnold's E. C. 61; 5 Manning and Granger's C. B., 54; *Cook v. Lockett*, 29 January 1846, L. J. (N. S.) 15 C. P. 78; 1 Barron and Arnold's E. C. 647; 2 C. B. Reports, 648, 1 Lutwyche's Regn. Ap. Cases, 422]. The non-payment of a rate, illegal on the face of it, does not disqualify, though the rate may not have been appealed against—[*Fox v. Davies*, 13 November 1848, L. J. (N. S.) 18 C. P. 48; 6 C. B. Reports, 11, 2 Lutwyche's Regn. Ap. Cases, 97; *The Queen v. the Mayor of New Windsor*, 10 June 1844, L. J. (N. S.) 13 Q. B. 337; 7 Q. B. Reports, 908]; but the non-payment of a rate *ex facie* good disqualifies [*Baker v. Locke*, 12 November 1864, L. J. 34 C. P., 49; 18 C. B. Reports N. S.) 52; *Hopwood and Philbrick's Regn. Ap. Cases*, 137.]

(5.) The term "borough rates" in the sense of the English Act 32 and 33 Vict., c. 55, has been held to apply only to the "borough rate" made and directed to be paid under the 92d section of the Municipal Corporation Act, 5 and 6 Will. IV., c. 76. A person was thus not held to be disqualified in consequence of not having paid a [watch rate made under the provisions of a local act. [*The Queen v. the Mayor of Lichfield*, 27 January 1842, L. J. (N. S.) 11 Q. B. 122; 2 Adolphus & Ellis, Q. B. 693; 2 Gale and Davison's K. B. 10.]

(6.) Parochial relief. Every kind of relief such as could be demanded and enforced under the Act 8 and 9 Vict., cap. 83, given by the parish to an individual himself, or to any member of his family whom by law he is bound to maintain, will cause a disqualification. Relief given to a man's father, or mother, or grandchild, however, it has been decided, will not disqualify the man himself. [*The Queen v. Ireland*, 15 January 1868, L. R. 3 Q. B. 130; *Trotter v. Trevor*, 17 November 1868, L. R. 4 C. P. 502, 13 C. B. Reports, (N. S.) 48. *Oldham*, 16 March 1869. O'M. & H., E. C., vol. i. pp. 159, 160.] Disqualification also results from the receipt of medical relief [*Oldham*, 16 March 1869. O'M. & H., E. C., vol. i. p. 160; *Bewdley*, 27 April 1869. O'M. &

for which he may also have been elected.¹ In like manner, if (1) a councillor, who has been elected, declines to accept, or fails to produce evidence of burghship;² or (2) if no person has been nominated for election as councillor in a ward in which a vacancy has to be supplied;³ or (3) if only one person has been nominated for election as a councillor in a ward in which two

H., E. C., vol. i. p. 176], except in case of accident [Colchester 4 April 1789; 1 Peckwell's E. C., 503], the receipt of medicine and attendance during cholera [Bedford, 14 March 1833, Perry and Knapp's E. C. 133; Cockburn and Rowe's E. C. 37, 97], or the being sent to a lunatic asylum at the expense of the parish [Bedford, 14 March 1833, Perry and Knapp's E. C., 129] See Rogers on Elections, (12 Ed.) pp. 211-218; Nicolson on Elections, p. 73; Nicolson's Analysis of Scotch Reform Act, 1868, p. 8.

(7.) Pensioner. By the Act of Convention 1685, c. 22, pensioners and beadsmen, as well as honorary burghesses and town servants, were excluded from voting in the election of magistrates and councillors. Pensioners were those who received an allowance from the community of the burgh, or from the kirk session; beadsmen proper were generally foundationers residing in an hospital or almshouse, and bound to give daily attendance at divine service to join in the prayers for their benefactor, but the name was often given to those who belonged to a public charity. This act, which proceeded on a representation from the royal burghs, had reference only to the immediately succeeding election, but has been understood to be declaratory of the common law, in so far as it excluded from electoral privilege classes of persons whose situation "creates a violent presumption of their being liable to influence." [Scots Acts, vol. iii., p. 176; Wight's Rise and Progress of Parliament in Scotland, p. 345.]

(8.) Charitable allowance from the town council revenue of the burgh, or from any corporate body within the same. When the usage of particular boroughs does not otherwise determine, the general principle in England seems to be that disqualification results from the receipt of charitable allowances only from those whose funds form a part of the general parish resources for the relief of the poor, and are managed by the overseer or other officer, whose duty it is to provide for and pay the paupers, in the same manner as if the funds had been the produce of the parish rates. Thus the brethren of the hospitals of St. Bartholomew and St. John, in the borough of Sandwich, who are required to be persons "having no competent means to live," were held to be not disqualified, these hospitals being under the government of charity trustees appointed by the Lord Chancellor. [Smith v. Hall, 17 November 1863, L. J. 33, C. P. 59; Hopwood and Philbrick's Regn. Ap. Cases, 11; Bedford, 21 March 1775, 2 Douglas's E. C., p. 69.] But the provision of the Act 39 Vict., cap. 12, would seem to disqualify all persons in the position of these brethren, when the governors of the charity, or other persons from whom the charitable allowances come, are a corporate body.

¹ See section 10 of the Act 3 and 4 Will. IV., cap. 76, and section 8 of the Act 3 and 4 Will. IV., cap. 77.

² Ibid.

³ See section 9 of the Act 31 and 32 Vict., cap. 108.

vacancies have to be supplied, leaving one vacancy to be filled up;¹ or (4) if two candidates for election in a ward in which one vacancy has to be supplied have received an equal number of votes, necessitating a double return;² or (5) if, from any other cause whatever, the vacancies in any ward have not been supplied,³ the provost or chief magistrate must appoint a new election of councillors to supply such vacancies.

A declinature to accept office by one of two persons having an equality of votes will not warrant the provost or chief magistrate in declaring the other to be elected. In all cases of double return, a new election is necessary.⁴

125. If a councillor, other than one elected *ad interim*, or other than one of the third who fall to retire, dies or becomes disabled between four o'clock on the Thursday immediately preceding the day of election, and the day of election, the annual election will proceed without reference to the vacancy so occasioned. But the course to be adopted for supplying the vacancy will now have to be determined; and the question arises, In what way should this be done? Should a new election be ordered and proceeded with under section 10 of the Act 3 and 4 William IV., cap. 76, as regards royal burghs; section 8 of the Act 3 and 4 William IV., cap. 77, as regards parliamentary burghs; and section 9 of the Municipal Elections Amendment (Scotland) Act, 1868, as regards both classes of burghs? Or should the case be dealt with as a vacancy occurring in the course of the year, necessitating the election of a successor *ad interim*, under section 25 of 3 and 4 William IV., cap. 76, and section 23 of 3 and 4 William IV., cap. 77?

The Acts 3 and 4 William IV., caps. 76 and 77, both require new elections to be ordered only in cases in which

¹ See section 9 of the Act 31 and 32 Vict., cap. 108.

² See section 10 of the Act 3 and 4 Will. IV., cap. 76, and section 8 of 3 and 4 Will. IV., cap. 77.

³ See section 9 of the Act 31 and 32 Vict., cap. 108.

⁴ An opinion to this effect was obtained by the burgh of Stirling, from Mr. Marshall (afterwards Lord Curriehill, the elder), on November 6, 1833, and there seems to be no room for questioning its soundness.

one person has been elected for more than one ward, or in which a double return has been made in consequence of an equality of votes in favour of one candidate, or in which any person duly elected has declined to accept office, or has failed to produce evidence of burgess-ship. The Amendment Act of 1868 appoints the same course to be followed when the names of the persons proposed for election are insufficient "to supply the vacancies in any burgh or ward," or when "such vacancies" have not been supplied "by reason of the requisite number of councillors not being elected from any cause whatever." But the vacancies referred to in the act of 1868 are obviously vacancies which have occurred prior to the time of nomination on the Thursday immediately preceding the day of election. The case supposed, however, is that of a vacancy occurring within the municipal year, but too late to admit of the vacancy being supplied at the immediately succeeding annual election on the first Tuesday of November. The expediency of having such a vacancy supplied by the electors is as great as in any of the cases in which a new election is expressly appointed. But, on the other hand, looking to all the statutory provisions on the subject, it rather appears that the annual election of councillors to supply all the vacancies which existed up to the latest period for nominating candidates, and specially the election of the third, having been completed, it would not be competent either to delay the election of magistrates and office-bearers, or to order a new election, which seems to have been contemplated only as a means of supplying vacancies which should have been filled up at the annual election on the first Tuesday of November. On the whole, it appears to the writer that, in the absence of express statutory provision for such a case, the best course is for the town clerk to report the occurrence of the death or disability to the town council at the first meeting after the annual election, and for that meeting to fix a day for electing an *interim* councillor to supply the vacancy—the election

of magistrates being proceeded with in the usual way.

126. Every new election must take place on a day not more than four nor less than two days from the date at which it is ordered, and notice of the day so appointed must be affixed to the church doors of the burgh. Candidates for election to supply these vacancies must be nominated in the way and manner above described; but the intimation of their names to the town clerk must be given on or before four of the clock afternoon of the second lawful day immediately preceding that fixed for the election. The notice of the election thus ordered should call attention to the time at which the nomination of candidates must be made.¹

127. In all other respects, these extraordinary elections must be conducted in the same way and manner as ordinary elections, until the council of the burgh is complete.²

128. So soon as all the vacancies in the council are supplied, the provost or chief magistrate will direct the council to be summoned for the following day, at a specified hour, to fill up the vacancies in the magistracy and office-bearers.³

2. Of Commissioners or Trustees elected by the Municipal Electors at the same time or along with Councillors.

129. In royal or parliamentary burghs in which commissioners or trustees under any local or general act of Parliament are appointed to be elected by the muni-

¹ See form of minute of meeting containing the order for a new election, Appendix XVI., No. 29 p. [222.]

See also form of notice of the time and place appointed for the new election, Appendix XVI., No. 30, p. [223.]

See section 10 of the Act 3 and 4 Will. IV., cap. 76, and section 9 of the Municipal Elections Amendment (Scotland) Act 1868.

² See section 10 of the Act 3 and 4 Will. IV., cap. 76; and section 9 of the Municipal Elections Amendment (Scotland) Act 1868.

³ See sections 15 and 17 of the Act 3 and 4 Will. IV., cap. 76.

See form of minute of this meeting, Appendix XVI., No. 31, p. [224].

cipal electors, or at the same time or along with the town councillors, the provisions of the several acts relating to municipal elections, and the procedure above described with reference to such elections, are applicable to every such election of commissioners or trustees. When at any such election, accordingly, the number of persons proposed for election as commissioners or trustees in any burgh not divided into wards, or in any ward of any burgh divided into wards, does not exceed the number of vacancies to be supplied in such burgh or ward, the town clerk or other person conducting such election must notify that there will be no poll in such burgh or ward, and such election must be proceeded with and declared in the same manner as has already been described with respect to the election of town councillors.¹ In any burgh or ward in which more persons are nominated for election as councillors and commissioners or trustees than there are vacancies to be supplied, and when a poll is consequently necessary, it is matter for consideration whether the names of the persons proposed as commissioners or trustees should be put upon the same ballot paper with the names of the persons proposed as councillors. There is nothing in the Ballot Act which appears to the writer to be prohibitory of such a conjunction; and looking to the additional labour and expense which a double set of ballot papers would have occasioned, as well as to the confusion which might have arisen if two ballot papers had been placed in the hands of each elector, when the system of voting by ballot was not generally understood, it was resolved, as regarded the elections of Councillors and City Road Trustees in Edinburgh, in the municipal election of 1872, to use only one ballot paper for both; the names of the candidates for election as councillors and trustees being printed in red ink, to make the distinction more marked. The experiment was perfectly

¹ See "The Municipal Elections Amendment (Scotland) Act 1870," section 4.

satisfactory, so far as regarded the voting, and no difficulty was experienced in counting the votes, but in some cases voting papers, which were good as regarded councillors, had to be rejected as regarded trustees, and *vice versa*.¹ In consequence, and even in view of the labour and expense which an additional ballot paper occasions, and the embarrassment which two papers undoubtedly creates to many electors, the writer recommended that in future elections one paper should be used in the election of councillors, and another, printed in a different colour, in the election of trustees or commissioners. This arrangement has since been carried out in Edinburgh in the election of the City Road Trustees. But if Parliament should, in Scotland, as it has done in England, sanction the use of one ballot paper for the election to different offices, that arrangement has important advantages over the system of separate ballot papers.

3. Of Councillors in Burghs of Regality and Barony, not being Parliamentary Burghs.

130. In Burghs of Regality and Barony, not being parliamentary burghs, the mode of electing the town council is

¹ The same course has since been sanctioned by Parliament with reference to municipal elections in England. "The Municipal Elections Act, 1875," requires, by section 6, that only one ballot paper shall be used by any person voting at the poll at any election of auditors and assessors. In such ballot paper it is enacted that "the names of the candidates for the respective offices shall be separate and distinguished, so as to show the office for which they are respectively candidates, and the ballot paper shall be in the form, No. 3, set forth in the first schedule to this act, or to the like effect, and the provisions of the Ballot Act, 1872, shall at any such election be altered and varied accordingly; provided always, that in counting the votes, every such ballot paper shall be deemed to be a separate ballot paper in respect of each office, and any objections thereto shall be considered and dealt with accordingly." Section 8 also provides that "any notice required by law to be given or published by the mayor, or other returning officer, or town clerk, in connection with any municipal election may, as to auditors and assessors, be comprised in one notice, and with respect to the election of councillors in any borough divided into wards, may comprise the matter necessary to such notice for the several wards in the borough, and it shall not be necessary to issue a separate notice for each ward."

prescribed by the charter or act of parliament by which each burgh has been erected, or under which its affairs are administered; and when the General Police Act of 1850 or 1862 has not been adopted in whole or in part in such burgh, the provisions of the Ballot Act do not apply to it.¹ The elections of councillors in such burghs must, therefore, be conducted in conformity with the old law and practice.

4. Of Commissioners of Police in Burghs and Places subject to the General Police Act of 1850 or 1862, and Amending Acts.

131. In burghs and populous places in which the General Police Act of 1850 or 1862 has been adopted, in whole or in part, and in which commissioners for executing the act have to be elected, the number must be fixed by the householders at the meeting at which the act is adopted, or at some adjourned meeting;² and must be not less than six, nor more than twelve;³ and where the burgh or place has been divided into wards, the number of wards and of commissioners must be so settled and adjusted that there shall be three commissioners for each ward.⁴

Under the Police Act of 1850 or 1862, the nominations of persons for election as commissioners were made at meetings of the householders, convened by the chief magistrate of the burgh, if a royal or parliamentary burgh,

¹ See Memorial and Opinion, Appendix XV., pp. [179], [180], [188].

² Section 25 of the General Police Act of 1850; section 36 of the General Police Act of 1862.

³ See section 27 of the General Police Act of 1850; section 44 of the General Police Act of 1862. These matters must be determined at the meeting at which the act is adopted, or at an adjourned meeting, and the omission to do so cannot afterwards be rectified. Nevertheless, the adoption of the act, if regularly done, will not be set aside, and the anomaly may exist, as in the case of Lasswade, of a police burgh, subject to the act, but without commissioners or magistrates of police to enforce its provisions. *Anderson and others v. Widnell and others*, 6th November 1868, 7 M.P. 81; 41 *Jurist*, 46. *Tod and Others v. Anderson and Others*, 23d January 1869, 7 M.P. 412; 41 *Jurist*, 231.

⁴ Section 28 of the General Police Act of 1850; section 45 of the General Police Act of 1862.

or a burgh of regality and barony in which it has been determined that the magistrates and council shall always be commissioners for carrying the adopted act into execution,¹ or, if otherwise, by the sheriff or sheriff-substitute. These meetings were held in the town hall or other convenient place within the burgh, if it was not divided into wards, and were presided over by the chief magistrate or sheriff, as the case might be, or, if the burgh was divided into wards, the meetings were held at some convenient place in each ward, specified in the notice calling the meeting, and each meeting was presided over by a person elected by the householders present, the place of each commissioner going out of office being supplied by the ward which returned him.² After the nomination, the determination of the meeting was ascertained by a show of hands, or otherwise, as the chief magistrate, or sheriff, or preses considered expedient, and if the election was unanimous, the person so nominated was declared to be elected. If, however, the election was not unanimous, and if a poll was demanded in writing by seven householders present at the meeting, the magistrate, or sheriff, or preses, as the case might be, opened and proceeded with the poll in the manner directed by the adopted Police Act. Thereafter the magistrate or sheriff declared the result of the poll.³

These provisions, in so far as they apply to the nomination and election of commissioners of police under the Police Act of 1850 or 1862, are now superseded by the Ballot Act, which, as has already been stated, enacts that such elections must hereafter be conducted in the same manner in all respects in which elections of councillors in the royal burghs specified in schedule (C) to the Act 3 and 4 Will. IV., cap. 76, are directed to be

¹ See No. 6 of these Observations ; see also section 39 of the General Police Act of 1850, and section 41 of the General Police Act of 1862.

² See the General Police Act 1850, section 33 ; and the General Police Act 1862, sections 50 and 55.

³ See the General Police Act 1850, sections 14, 29, 30, and 31 ; The General Police Act 1862, sections 29, 33, 46, 47, and 48 ; and Memorial and Opinion, Appendix XVI., pp. [177], [181], [187], and [188].

conducted by the acts in force at the time of the passing of the Ballot Act as thereby amended.¹

The more effectually to make its provisions applicable to such elections, the Ballot Act declares that "in this Act" the expression "municipal borough," shall mean "any place for the time being subject to the Municipal Corporation Acts;" that the expression "Municipal Corporation Acts" shall mean, as regards Scotland, the Acts 3 and 4 William IV., caps. 76 and 77, the General Police Acts of 1850 and 1862, and any acts amending the same; that the expression "municipal election" shall mean, as regards Scotland, "an election of any person to serve the office of councillor or commissioner of any municipal borough, or of a ward or district of any municipal borough,"² and that in part two of schedule first, as applying to municipal elections in Scotland, the expression "town-clerk" shall include the clerk appointed by the commissioners of police under the General Police Acts of 1850 and 1862.³ It is scarcely necessary to point out that the object and effect of these provisions is simply to shorten phraseology and facilitate legislation as regards the election of commissioners. It does not change the character of populous places which adopt the act of 1850 or 1862, and constitute them anything more than police burghs, or alter in any respect the designations of the senior and junior magistrates of police, of the commissioners of police, or of the clerk, treasurer, or collector to the commissioners.⁴

¹ See section 22, sub-section (2), of the Ballot Act.

² See section 29, sub-section (b), of the Ballot Act.

³ See rule 65 of schedule First of the Ballot Act.

⁴ In 1876 the burgh of barony of Lerwick, in which the General Police Act of 1862 had been partially adopted, applied for and obtained a Provisional Order, under which its municipal system was readjusted, and the burgh was relieved from the difficulty in which it was placed in consequence of proceedings connected with the election of bailies and councillors in 1874. [See footnote to No. 135 of these Observations.] The promoters of that measure sought to change the designation of the senior bailie to that of "provost," and pleaded that the senior magistrates of several police burghs and populous places, constituted under the General Police Act of 1850 or 1862, assumed that title, and were so

In the application of the provisions of schedule First of the Ballot Act to municipal elections,—and for that purpose alone,—the expression “town-clerk” is declared¹ to include the clerk appointed by the police commissioners, but, in the interval between the adoption of the act and the first election of commissioners under it, no such clerk exists. The duties which, under the Ballot Act and the several municipal election statutes, have to be discharged by the town-clerk or clerk to the police commissioners in regard to municipal elections, must therefore, *ex necessitate rei*, be performed either by the chief magistrate or sheriff himself, or by a clerk appointed by such magistrate or sheriff.²

132. Difference of opinion exists as to whether the Ballot Act has effected any change in the person who must act as returning officer in burghs and places subject to the General Police Act of 1850 or 1862, other than royal and parliamentary burghs, or burghs of regality and barony, in which the magistrates and council have been determined to be the commissioners for carrying the adopted act into execution as specified in No. 6 of these Observations. By both of these statutes the duty of conducting elections of commissioners of police in burghs and places, other than those specially excepted as above, was laid on the sheriff of the county. And he must still undoubtedly act as returning officer in the first elections of commissioners in burghs and places not so excepted, there being no provost or chief magistrate who can do so.³

known popularly in some districts. The Secretary of State, however, on the advice of the Lord Advocate, refused to sanction the proposed change, holding that the title of “provost” belonged exclusively to the chief magistrates of royal and parliamentary burghs, and of burghs created by charters which expressly conferred that title on the chief magistrate.

¹ See Rule 65 of schedule First of the Ballot Act.

² See sections 10 and 30 of the General Police Act of 1850, and sections 25 and 47 of the General Police Act of 1862.

³ In such cases, the sheriff will provide the requisite ballot boxes, and other things requisite for the election, there being no provost or chief

But it has been maintained, and the opinion has been adopted by a committee of sheriffs, that the Ballot Act transfers the duty, in all elections of commissioners of police after the first, to the chief or senior magistrate of such burghs or places. By section 29 of the Ballot Act, the expression "municipal election" in Scotland is declared to mean "an election of any person to serve the office of councillor or commissioner of any municipal borough, or of any ward or district of any municipal borough." Section 20 of the same act, sub-section (1), declares the term "returning officer" to mean the mayor or other officer who, under the law relating to municipal elections, presides at such elections; section 22, sub-section (1), defines the term "mayor" to mean the provost or other chief magistrate of a municipal borough; while the term "municipal borough" is declared, by section 29, to mean, in Scotland, any place for the time being subject to *inter alia* the General Police Act of 1850 or 1862. Construing these provisions together, the committee of sheriffs were of opinion that all burghs or places subject to the General Police Act of 1850 or 1862 are municipal boroughs, and the election of commissioners of police within them are municipal elections, and that the provost or chief or senior magistrate of every such burgh is constituted the returning officer. A concurrence of practice following upon the opinion thus formed by the learned sheriffs will probably be held to settle the matter; but the writer feels bound to say he has not been able to change the opinion he originally formed and ventured to express on this question. Section 20 of the Ballot Act provides that a municipal election shall, *except in so far as relates to the taking of the poll in the event of its being contested*, be conducted in the manner in which it would have been conducted if the Ballot Act had not been passed; and section

magistrate to do so; and the providing of every requisite being essential to the performance of the duty which the legislature has conferred upon him.

22, sub-section (2), enacts that all municipal elections shall be conducted in the same manner in all respects in which elections in the royal burghs, specified in schedule (C) of the Act 3 and 4 Will. IV., cap. 76, are directed to be conducted by the acts in force at the time of the passing of the Ballot Act, as amended by that act. The effect of these clauses and of the other provisions of the act, is undoubtedly to assimilate the mode of conducting municipal elections in all burghs, royal, parliamentary, and police, and to substitute vote by ballot for an open poll in all contested municipal elections; but the arrangements in connection with such elections seem otherwise unaffected, except where expressly or by necessary implication altered by the act. The definition of the term "returning officer" makes no change, for it says the term shall mean mayor or other officer who, under the law relating to municipal elections, presides at such elections. Under the Police Act of 1850 or 1862 that officer, in burghs and places other than royal and parliamentary burghs, or burghs of regality and barony in which the magistrates and council have been determined to be the commissioners of police, was undoubtedly the sheriff of the county, and all the provisions of the Ballot Act may still be carried out by him as well as by the chief or senior magistrate. The definition of the term "mayor" does not restrict the previous definition of "returning officer;" and the writer is unable to see in what way the sheriff is relieved of the duty which he had to discharge previous to the passing of the Ballot Act.

133. What has been said relative to the nominations and election of town councillors, the counting of the votes, and the custody of the papers and documents connected with the election, is generally applicable to commissioners of police in burghs subject to the General Police Act of 1850 or 1862.

In regard to the election of commissioners, however, a few observations may here be offered.

(1.) Under the provisions of the acts of 1850, 1862, and

the Amending Act of 1868,¹ every male occupier of lands or premises within the burgh, which are entered in the valuation roll in force at the time of the election as of the value of £4 and upwards, is a householder, and subject to certain conditions as to payment of rates,² is entitled to vote, and is eligible as a commissioner.³ Partners of companies occupying lands or premises of the yearly value of £4, or of greater value, so as to afford more than one qualification of £4, may also grant authority in writing to any one or more of the partners, not exceeding six in number, to vote, and the partner or partners so authorised are deemed householders, and have votes accordingly. A mere error in the name or description of the householder will not disqualify him.⁴ It is not indispensable that his name should appear on the valuation roll, if, at the time of the election, he actually occupies personally, or as the duly authorised partner of a firm, lands or premises which appear on the roll as of the required value.⁵

¹ Sections 2, 12, 30, and 34 of General Police Act of 1850.

Sections 3, 27, 47, and 53 of General Police Act, 1862.

Sections 3 and 4 of General Police Amendment Act, 1868.

² See No. 5 of these Observations, see also sub-section (2), pp. 224-225.

³ See No. 5 of these Observations.

⁴ See footnote to No. 68 of these Observations, p. 90.

See also *Macdonald v. Robertson and others*, 17th May 1876, *infra*.

⁵ See *Macdonald v. Robertson and Others*, 17th May 1876. In this case the valuation roll of the police burgh of Maryhill contained an entry of David Swan, junior, and Company, as occupiers of premises of the annual value of £220. On 31st December 1874, a change took place in the partnership—the new firm taking the name of David Swan and Sons. At election of police commissioners in June 1875, Mr. J. M. Swan, who was a partner of the new firm, and held a written authority from the new firm to vote, was elected a commissioner. His election was sought to be reduced on the ground that he had not the qualification as a householder under the Police Acts of 1850 and 1868, as neither his name nor the name of his firm appeared in the valuation roll in force at the time of the election. The objection was unanimously repelled by the First Division of the Court, and in regard to it the Lord President observed,—“I think that the objection is bad on its merits. The qualification prescribed by the Police Act of 1850, is that of a ‘householder’ within the burgh, which is explained by the Police Act of 1868 to be ‘a male occupier of lands or premises of the yearly value of £4 and upwards as appearing on the valuation roll.’ It must appear that the premises are of the yearly value of £4. What is the position of the candidate? He

(2). It has been seen that, under the act of 1868, no householder is entitled to vote at any meeting or election under the act of 1850 or 1862, who has been exempted from payment of the whole or any part of his rates or assessment under either of these acts on the ground of poverty or inability to pay,¹ or who has not paid all rates or assessments due and payable by him under these acts at the time of so voting.² This provision amended, as regards the right of householders *to vote*, the enactments of section 34 of the act of 1850 and of section 53 of the act of 1862, but left unaffected the disqualification *for election as a commissioner* which these enactments created. No person, therefore, is eligible as a commissioner under the act either of 1850 or 1862, who has been relieved from the assessment made on him for the purposes of the act,¹ for the year immediately preceding, on the ground of inability to pay the amount. Under the act of 1850, moreover, no one is eligible as a commissioner by whom any arrear of any assessment due under the act “shall, at the time of the election, have been owing for the space of a month, and shall, since it became due, have been demanded.” The act of 1862 attaches a similar dis-

was the partner of a firm who were occupiers of premises of the yearly value of £220 in the valuation roll, and he was deputed by his partners to represent them. He had more than the necessary qualification. But it is said that he acquired the qualification only shortly before by becoming a partner of David Swan and Sons, and that no such firm appears on the valuation roll. But the firm of David Swan, junior, and Company, does appear on the register. The proper firm does not appear on the roll, but that is a mere accident, there being no opportunity to change the name since the new firm was constituted. The condition of the roll for the time is that there is a mere misnomer, not arising from any fault or neglect of the candidate, but *ex necessitate rei*.” Lord Deas concurred with the Lord President, observing:—“It is not necessary that the candidate’s name should appear on the valuation roll; and apart from this there is nothing to show that he had not the necessary qualification.” [The Scottish Law Reporter, vol. xiii., p. 426; Court of Session Cases, (fourth series) vol. iii., pp. 645-651.]

¹ The Police Assessment is the only assessment from payment to which the commissioners have power to grant relief on the ground of poverty. See sections 63 and 70 of the act of 1850; sections 84 and 88 of the act of 1862

² See No 5 of these Observations.

qualification to every person by whom any arrear of any assessment under it "shall, at the time of the election, be owing, and shall have been demanded." Both acts give the same effect to arrears of all assessments leviable under their provisions respectively, whether due by the person himself or by any company or co-partnership by which he is authorised to vote, and declare that a certificate, under the hand of the collector of the commissioners, shall be sufficient evidence of such arrears or relief.

(3.) Questions have been raised whether, in the event of lands or premises beyond the limits of a police burgh being erroneously entered in the valuation roll in force at the time of an election, the occupier of these lands or premises is a householder in the sense of the acts, and is entitled as such to vote and to be elected a commissioner. On the one hand it has been maintained that while the entry in the roll of lands or premises is an indispensable condition of householdership, and is conclusive as to value, the lands and premises must, as matter of fact, be in the burgh of which the occupier claims to be a householder; that liability for the rates and assessments imposed under the General Police Act in operation in the burgh, is presupposed in the enactments which make exemption on the ground of poverty or inability to pay, and non-payment, disqualifications for voting¹ and for being elected a commissioner,² and that no entry in the valuation roll could establish such liability in respect of lands or premises outside of the burgh; that an entry, therefore, which does not establish liability for assessment (as it would do if the lands or premises were within the burgh), cannot confer the privilege of householdership; and that the only fair and reasonable construction of the third section of the act of 1868, is to read it as if it expressly declared the term "householder" to mean "a male occupier of lands or

¹ Section 5 of the act of 1868. See also No. 5 of these Observations.

² Section 34 of the act of 1850, and section 53 of the act of 1862. See also sub-section (2), *supra*.

premises *within the burgh*, of the yearly value of £4 and upwards, as appearing on the valuation roll. On the other hand it has been maintained that, admitting householdership in the burgh to be essential, the act of 1868 defines a householder to mean an occupier of lands or premises of specified value *as appearing in the valuation roll*, which roll is thus evidence of householdership which cannot be redargued. The latter view seems to receive confirmation from an opinion given by Mr. Watson in June 1876,¹ though the circumstances of the case on which the opinion was given were special.

¹ The election of Mr. William Chambers as a Commissioner of Police of the burgh of Motherwell, on 27th April 1876, was objected to on the ground that though he occupied premises within the burgh, these did not appear in the valuation roll made up and certified by the assessor in October 1875, and in force at the time of the election. Chambers' name had been erroneously entered in that roll as occupier of a house and workshop which were outside of the burgh boundaries; but on discovering the mistake, the commissioners of police abated the whole assessments in respect of these subjects, so that no assessments were paid on account of them. A few days before the election Chambers applied to the assessor to have his name put on the valuation roll as occupier of the premises within the burgh, and the assessor made up a supplementary roll in which he entered only these premises, as in the occupancy of Chambers, who thereupon paid police rates in respect of them, though no charge was made against them in the assessment roll docketed by the clerk and two commissioners in terms of section 107 of the act of 1862, under which the burgh was created. Chambers' name was afterwards entered in the register of householders made up for the election, and no objection was taken thereto, nor to his nomination as a commissioner, nor to his right to vote in the election. A committee of commissioners was appointed, in terms of section 48 of the act of 1862, to inquire into the merits of the disputed election, and to report thereon, and they consulted Mr. Watson on the following points, and obtained his opinion thereon as follow:—

QUERY I. Mr. Chambers' name not having been on the original valuation roll, but only on the supplementary roll, and then entered on the presiding officer's roll, and no objection having been taken to his nomination, or to his name being on the presiding officer's roll, or to his voting, can a committee of commissioners, acting in terms of section 48, unseat him, or have they that power, considering that the presiding officer held him as eligible?

Ans. 1. It is stated in the memorial that the name of Mr. Chambers appears in the valuation roll of the burgh certified correct by the assessor, as occupier of the workshop which is without the burgh boundary. If that valuation was in force at the date of the election of the commissioners, on 27th April 1876, and had not been superseded by a new valuation roll made up and certified in statutory form, I am of opinion that even though his

(4.) The Ballot Act does not affect the time at which elections of commissioners in the various burghs subject to the act of 1850 or 1862 must take place;¹ nor does it specify the days when notices are to be issued and

name was put on the burgh roll by mistake, in respect of subjects beyond the limits of the burgh, William Chambers was eligible as a commissioner, provided the entry in the roll described the subjects as of the yearly value of £4 or upwards. The only qualification required of a commissioner under the General Police Act of 1862 (sec. 47), is that he shall be a householder of the burgh. The amending act of 1868 (sec. 3) defines the meaning of "householder" in the act of 1862 to be a male occupier of lands or premises of the yearly value of £4 and upwards *as appearing in the valuation roll*. The entry in the burgh valuation roll is the sole test of qualification, and cannot, in my opinion, be redargued, however erroneous it may be. Nor can any injustice result from the rule thus established, at least in a case like the present, because it seems very clear that had any one objected to the entry made in the burgh roll on the ground of its being erroneous, Mr. Chambers would have had his attention directed to the matter, and would have obtained a qualification by having his name entered as owner of the subjects actually occupied by him within the burgh. It is not matter of dispute that he actually did own and occupy subjects within burgh, which, if properly entered in the valuation roll, are sufficient of themselves to qualify him for the office of commissioner. I may add that exemption on the ground of poverty and inability, or failure to pay rates and assessments, do not affect the qualifications of a commissioner [But see No. 133 of these Observations, sub-section, (2) *supra*], though by section 5 of the act of 1868, they deprive a householder of the right of voting.

The roll made up by the presiding officer is prepared for purposes of voting merely, and can, in my opinion, have no effect whatever in determining the qualification of a commissioner. I also think that the presiding officer has not power to judge of the qualifications of a commissioner—that being a matter entrusted by the act of 1862 (sec. 48) to the final determination of a committee of the commissioners themselves. [See sub-section (5) *infra*.]

QUERY II. Has the assessor power to issue a supplementary roll at any time previous to the election, and can the returning officer or clerk legally enter any name on his roll which is on the supplementary roll, but not on the original roll; and is the party qualified for election by having his name entered on the supplementary roll?

Ans. 2. So far as I am aware, the only authority which the assessor has to issue a supplementary roll is derived from the provisions of section 17 of the Valuation Act of 1854. The supplementary rolls referred to in the memorial do not appear to be of the character contemplated by that clause; and I am therefore of opinion that no effect can be given to them in judging of the qualification of Mr. Chambers.

¹ See section 33 of the General Police Act of 1850.

See section 50 of the General Police Act of 1862.

See No. 29 of these Observations.

nominations received. In such cases the only course which can be adopted in fixing the several dates at which the various proceedings connected with these elections should take place, is to be guided by the analogy of the acts relating to the election of councillors in royal burghs. This course was suggested in the memorial submitted in 1872 to Mr. A. R. Clark and Mr. Watson, and was concurred in by them at consultation.¹ Thus, then, the intimation by the clerk of the vacancies in the commission, and of the places at which the polls are to be taken, should be made ten days at least previous to the election, whenever that may be;² and the nominations of persons for election should be lodged with the clerk on or before four of the clock afternoon of the fifth day immediately preceding the election.³

When the fifth day before the election happens to be a Sunday, the nominations should be lodged with the clerk on or before four o'clock on the immediately preceding Saturday, so as to obviate all question. The writer would be disposed, however, to receive nominations lodged previous to twelve o'clock P.M. on the Saturday, so as to give the utmost possible facility for nominating candidates.

When the same day of the month as that on which the first election of commissioners for the burgh took place happens in any succeeding year to be on a Sunday, the election takes place on the following Monday.

(5.) In the event of any difficulty arising as to the qualification or identity of any householder, it must be decided at the time by the chief magistrate or sheriff acting as returning officer, whose determination is final.⁴ Objections of this nature should, when known, be stated

¹ See Memorial and Opinion forming Appendix No. XV., p. [181].

² See No. 34 of these Observations.

³ See No. 35 of these Observations.

Section 12 of the General Police Act of 1850; section 27 of the General Police Act of 1862.

to the returning officer at the election before the vote is received. The returning officer has no power to adjudicate on the qualification of a candidate, much less is his judgment on such a matter final.¹ Any objection to the qualification of a candidate should, however, be formally stated and intimated by public notice or otherwise to all the electors before the poll commences. If that be done, and the candidate nevertheless receives a majority of votes, but the objection is afterwards sustained, the candidate who receives the next highest number of votes may be declared to be duly elected, if the Court shall hold that the objection was of such a nature as absolutely to invalidate all votes given for the candidate objected to, in the knowledge of the objection.¹

¹ *Macdonald and Others v. Robertson and Others* (Maryhill Election case), 17th May 1876. In this case it was contended that the provision of section 12 of the act of 1850, referred to in the text, authorised the chief magistrate finally to dispose of an objection to the eligibility of Mr. J. M. Swan, a candidate, as not being a householder, and this contention was sustained by Lord Young, who said—"The objection, which appears to depend on the validity of his qualification as a member of a partnership owning and occupying premises in the burgh, was stated in writing to the returning officer at the time of the election, and repelled by him after hearing parties. The senior magistrate was, as such, returning officer, and being of opinion that the objection regarded Mr. Swan's qualification as a householder, I must hold that the decision of the magistrate is final by section 12 of the Police Act." The First Division of the Court, however, dissented from the view of the Lord Ordinary on this point, and the Lord President (Inglis) observed in regard to it:—"I confess I am not inclined to agree with him (the Lord Ordinary) in that, for it seems to me that the statute supplies no mode of deciding such a question by reference to the returning officer, or any other officials. There are various other things a returning officer may do, and in some his jurisdiction is not subject to review; but he has no power to adjudicate on objections to the qualification of a candidate; much less is his judgment said to be final. In fact, he did not do so. I do not say that if the objection had been perfectly simple, as for example, that the candidate was not a shopkeeper in Maryhill, but in Edinburgh, he might not perhaps have interposed, but the objection stated was that he was not a householder in the meaning of the Act of Parliament.

"If this objection was to be stated, it ought to have been stated at the opening of the election, before the poll began, that every one might have noticed that in the event of its being sustained their votes might be thrown away, and it is averred by the pursuer that it was so stated; if so, it was timeous and good notice. I am aware that this is disputed,

(6.) Following the principle explained in sub-section (4), the declaration of the poll should be made by the chief magistrate or sheriff on the day immediately following the election, between the hours of twelve noon and two P.M.;¹ and the persons elected should be required² to attend at a specified place on the second day after the election, and declare whether they accept or decline to accept office.³

134. The course to be followed in cases of disputed elections, and equality of votes, and also in the case of persons elected declining to accept, or of failure on the part of the householders to elect commissioners to supply vacancies, will afterwards be considered.⁴

135. In the burghs referred to in Nos. 6 and 7 of these Observations, and which—having adopted the General Police Act of 1850 or 1862, in whole or in part—are “subject to” the Police Act so adopted, it seems to be the meaning and intention of the Ballot Act that the elections of the persons who are to enforce the provisions of the adopted act shall be conducted in the manner prescribed by the Ballot Act. In 1872, Mr. A. R. Clark and Mr Watson were consulted upon the point, which was fully considered by them in consultation. The question appeared to them to be attended with considerable diffi-

and it is said that the poll had been open for twenty-five minutes before it was stated. I assume that the pursuers' allegation is true, but the objection is bad on its merits. . . . Assuming, therefore, that the objection was stated in time, I think we have jurisdiction to consider it, and I cannot entertain it.” [Scottish Law Reporter, vol. xiii., p. 426; Court of Session Cases (Fourth Series) vol. iii., p. 651.]

¹ See No. 114 of these Observations.

² Section 41 of the General Police Act of 1850, and section 58 of the General Police Act of 1862, direct all the commissioners to be cited to attend “all meetings both special and statutory (save only the first meetings under this act)” by written or printed summonses issued by their clerk. The exception of “first meetings,” it is presumed, applies to meetings held after the first election of commissioners, but before a clerk has been elected. Where there is a clerk, he will cite all the commissioners to attend every meeting.

³ See No. 117 of these Observations.

⁴ See Nos. 157, 158, and 159 of these Observations.

culty, but they were of the opinion above expressed.¹ The same question in a more precise form was afterwards submitted to Mr. Clark, with reference to Ardrossan² and Pollockshaws,³ and still later to him and to Mr. Balfour,

¹ See Memorial and Opinion forming Appendix XV., pp. [182], [183], [189], [190].

² Ardrossan was erected into a Burgh of Barony by the Act 9 and 10 Victoria, cap. 186, and adopted the General Police Act of 1862 in part. The magistrates and council of the burgh are elected under the provisions of the local act, and are also the commissioners for executing the General Police Act, so far as adopted. In that case Mr. Clark gave the following opinion :—(1.) I am of opinion that the Ballot Act applies to Ardrossan. It is a place which is “subject” to the Police Act of 1862, and the magistrates and council are the body by whom the provisions of that act are carried into execution. It seems to me to be the fair meaning of the Ballot Act, that all persons who are in future to enforce the provisions of the Police Act shall be elected in the manner provided by the Ballot Act. (2.) I am of opinion that the nomination ought to be made in the manner provided by the acts regulating the royal burghs contained in schedule (C) of the Burgh Reform Act, and that the poll should take place in the manner prescribed by the Ballot Act. On this matter I may refer to the opinion given on the case referred to in the first page of this memorial. [Memorial and Opinion, Appendix XV.] Except to this extent, the sections of the local act are not, in my opinion, altered. The Ballot Act makes no change in the qualification of electors, or in the regulation for making up the list of electors, or in any other matter except in the mode of carrying out the elections.

³ Pollockshaws was erected into a Burgh of Barony in 1813, by a charter which provides that the magistrates shall consist of a provost and one bailie, and that they, with six councillors and a treasurer, should have the management of the common good. All the inhabitants of the burgh, of lawful age, and in the possession of a house, garden, ground, or other property rented at or of the value of £4, are declared to have right to become burgesses, to vote at elections, and to be eligible for the office of magistrate, treasurer, and councillor. The municipal election is appointed to take place on the first Tuesday of October in each year, and the charter of erection contains a clause which has been interpreted to mean that one magistrate only shall be chosen each year, a provost and a bailie alternately, so that each remains in office for two years. In 1858 the General Police Act of 1850 was adopted in part, and it was determined, in virtue of section 39 of that act, that the magistrates and council should always be the commissioners for carrying the act, so far as adopted, into operation. In that case Mr. A. R. Clark gave the following opinion :—1. The Burgh of Pollockshaws has its own constitution, and though the inhabitants adopted the Police Act of 1850 for certain purposes, they resolved that the magistrates and council for the time being should be the commissioners of police. In other words, the provisions of the act, in so far as adopted, were to be put into execution by the magistrates and council elected in the manner prescribed by the act and usage of the burgh. The act of 1850, therefore, did not make any change on the municipal elections. The question is, whether the burgh of Pollockshaws is subject to the Police Act of 1850,

with reference to Lerwick.¹ In all these cases substantially the same opinion was given.

136. Where the police of a royal or parliamentary burgh is

within the meaning of the Ballot Act. It is not subject to that act in so far as regards the election of its magistrates and council. But it is subject to it in the sense that its provisions have, to a material extent, been adopted. I am sensible of the difficulty of this question; but I have come to be of opinion, though with much hesitation, that the Ballot Act applies to the burgh of Pollockshaws, and regulates the mode of election therein. It was intended, I think, to be a very comprehensive measure, and the sound construction of it appears to me to be, that it regulates the mode of election in every place where the municipal acts are in force; or in other words, that the persons who are in future to enforce the provisions of any of these acts must be elected in the manner prescribed by the Ballot Act. It is true that the act has been adopted only in part; but that does not in my mind make any difference. For in some cases where there can be no doubt that the Ballot Act would apply, the Police Act may be only partially adopted, as for instance, when it has been partially adopted within a populous place as defined by the sheriff. Further it is, I think, the right course to hold that the ballot applies. The constitution of the burgh does not prescribe any particular mode of conducting the election. It is very doubtful whether it would be beyond the competence of the council to adopt the mode of election prescribed by the Ballot Act. But it is plain that it would be beyond their competence to adopt any other method if the act applies. 2. I am of opinion that the electors remain the same. The Ballot Act changes only the mode of election, and does not change the constituency. 3. I am of opinion that the election ought to be continued as formerly. As I have said, the Ballot Act relates only to the mode of election, or in other words, to the manner in which municipal franchise is to be exercised. It does not affect the constituency or the term of office for which the magistrates or councillors shall be elected. These are matters which, in my opinion, are regulated by the set and usage of the burgh. Nor, in my opinion, has the act of 1850 any application in this matter. It had no application before the Ballot Act, and it receives no additional force from that act.

¹ Lerwick was erected into a Burgh of Barony in 1818, by a charter which empowered the burgesses qualified as therein set forth to elect two bailies, nine councillors, and a clerk, every three years. Every male inhabitant in the burgh, of lawful age, and infeft in any heritable subjects within the burgh, or possessing as tenant any heritable subject within the burgh of a rent of £10 sterling yearly and upwards, was declared to have the right of a burghess, and to be entitled to vote at the elections, and to be eligible to the office of magistrate or councillor, provided he was a resident burghess. Each election was appointed to be made on the first Thursday of November in every third year, at a public meeting of the burgesses, duly convened. The first duty of the meeting was to elect a preses and also a common clerk of the burgh, who thereupon acted as clerk to the meeting. Thereafter the meeting by a majority of votes elected two burgesses to be bailies and nine to be councillors. In addition to his deliberative vote, the preses had a casting vote in cases of equality of votes. In 1867 nearly all the clauses

administered under the provisions of a local act by commissioners distinct from the town councillors of the burgh, the Ballot Act does not apply to the election of these com-

of the General Police Act of 1862 were adopted in the burgh, and it was resolved that the bailies and councillors should always be commissioners of police. In view of the election of 1874, the town-clerk, assuming that the provisions of the Ballot Act applied to the election of the bailies and councillors, issued a notice that the election would take place on 3d September between 8 a.m. and 4 p.m., that if there was a contest the vote would be taken by ballot; and that the names of candidates had to be intimated to him. Two persons were afterwards nominated for the office of senior bailie and two for that of junior bailie, and nineteen for the office of councillor. Of the four persons nominated bailies, however, only two were, in the opinion of the town-clerk, "resident burgesses." He therefore disallowed the others, and declared that as only the required number had been nominated bailies, no poll would take place as regarded them, and the persons nominated would be declared duly elected. A poll as regarded the councillors was, however, intimated, and took place. Meanwhile the two persons duly nominated bailies declined to accept office. Nevertheless they were declared duly elected. While the poll was being taken as regarded the councillors, a meeting of the burgesses took place, and elected two bailies and nine councillors under the former practice. The persons elected bailies at this meeting were those who had previously been nominated for that office to the town-clerk, but he, as has been stated, conceiving them to be non-resident, and therefore disqualified under the charter, ignored their nomination, and further did not insert their names in the register of voters prepared for the use of the presiding officer at the poll. No such register had been prepared under the old practice, and was only used at the poll as a necessary part of machinery for conducting the election. Nevertheless, one of the persons so excluded applied for a ballot paper with a view to vote at the poll, but was refused by the presiding officer on the ground that his name was not in the register. Thereupon he protested against the validity of the election. In these circumstances counsel were consulted, and gave their opinion on the following points as follows :—

QUERY I. What is the proper procedure to follow in the case of the Burgh of Barony of Lerwick for electing magistrates and town councillors? Are the provisions of the burgh charter as to qualifications of electors, magistrates, and councillors; and the time and mode of election, still operative; and if so, whether altogether or to what extent? Or must the Ballot Act, 1872, and relative acts regulate? If the latter, do the *whole* provisions and regulations and machinery of the acts apply just exactly as in the case of a royal burgh; that is, must the qualification of electors, and the time, mode, and procedure for electing, be taken from these acts, without reference to the burgh charter? It will be noted that while the charter provides for the election of two magistrates and nine councillors, the acts in question only contemplate the election of commissioners or councillors, who are to elect magistrates from among themselves. It will further be noted that section 65 of the Ballot Act 1872 explains the meaning of "register of voters" to be "the register, list, or roll of persons entitled to vote in a municipal election, made up according to the law for the time being in force," and also that section

missioners, which should still be conducted in the way and manner prescribed by the local act. In the royal burgh of Banff, some doubt was entertained as to whether the

6 of the Municipal Elections (Scotland) Act, 1868, provides for the making up of registers or rolls of voters in royal burghs. If the provisions of the charter are not to be followed, how are magistrates to be elected so as to make up the full number required by—"the set or usage of the burgh?" Should *eleven* councillors be chosen, and should they then elect magistrates from among themselves?

Ans. 1. The question whether the Ballot Act of 1872 applies to the Burgh of Barony of Lerwick, appears to us to be attended with considerable difficulty; but upon the whole we are of opinion that the method of taking the poll by ballot in electing magistrates and town councillors prescribed by that act, is the proper method to be adopted in the burgh. The first question is, whether Lerwick is a "municipal burgh," "subject" to the General Police and Improvement (Scotland) Act, 1862, within the meaning of section 29 of the Ballot Act of 1872; and upon the whole we think that it is. The act of 1862 has been in nearly all its clauses adopted in Lerwick, and in terms of section 41, it was resolved that the magistrates and town council should always be commissioners of police. This appears to us to be sufficient to make Lerwick "subject" to the act of 1862, within the meaning of the Ballot Act. But there remains the other and more difficult question, whether the provisions of the Ballot Act as to taking the poll would, if followed out, be subversive of any fundamental article of the charter? If these provisions were subversive of any such fundamental article, we consider that the Ballot Act would be inapplicable, because the declaration in section 20 as to the conducting of the poll is not absolute, but only "so far as circumstances admit," and if any fundamental article of the charter was inconsistent with vote by ballot, the circumstances of the burgh would not, in our judgment, admit of the provisions of the Ballot Act being applied. Upon the whole, however, we do not think that the declarations of the charter in regard to the method of conducting the poll exclude the taking of the poll by ballot, even at such a meeting as the charter directs to be held, and as the vote to be taken is a popular vote, and the policy of the legislature, in passing the Ballot Act of 1872, was to prescribe a uniform method of taking such popular votes, viz., the method of ballot, the courts of law would, in our judgment, construe the act in a comprehensive rather than in a restricted sense. And if it is held that the vote must be by ballot, we think it would not be a fundamental alteration of the provisions of the charter to hold further that it should be taken between the hours of eight and four, instead of at twelve o'clock only. While, however, we think that the proper mode of taking the vote is by ballot, we are of opinion, that as regards the qualifications of electors, magistrates, and councillors, and the date of election, or in other words, in regard to all matters except the taking of the poll, and the preliminaries necessary for taking it by ballot, or otherwise incidental to that method of taking it, the provisions of the burgh charter remain unaltered, and

Ballot Act did not apply to the election of the commissioners of police, in respect that although neither of the General Police Acts of 1850 or 1862 was adopted in the

accordingly that two magistrates and nine councillors fall to be chosen as such by the electors. The duty of the electors is not changed to that of choosing eleven councillors, who would again choose two magistrates from among their number.

The question what matters properly fall within the "conducting" of the poll, so as to be governed by the provisions of the Ballot Act? is also attended with difficulty, but our opinion is, that not merely the actual proceedings on the day of the poll, but the antecedent nomination, would be held to be regulated by that act. Article 22 of part I. of the first schedule appended to the act, provides that "every ballot paper shall contain a list of the candidates described as in their respective nomination papers," &c., which implies that there must have been an antecedent nomination, and without such antecedent nomination several days previously, the ballot papers could not be prepared, or the other provisions for taking the poll by ballot complied with. But as we have already stated, we think the date of the election must be that prescribed by the charter, and hence it follows that the requisite nomination could not be made at a meeting of burgesses at twelve o'clock on the day of the election; and accordingly it appears to us that the second part of section 22 of the Ballot Act, must be held to have a certain application to the case of Lerwick, viz., the part which provides that "all municipal elections shall be *conducted* in the same manner in all respects in which elections of councils in the royal burghs contained in schedule C to the act of the session of the 3d and 4th years of the reign of King William the Fourth, chap. 76, entitled An act to alter and amend the laws for the election of the magistrates and councillors of the royal burghs in Scotland," are directed to be conducted by the acts in force at the time of the passing of this act as amended "by this act, and all such acts shall apply to such elections accordingly." It will be observed that this enactment only makes applicable the provisions of the recited acts relative to the *conducting* of elections, not their provisions relative to the qualifications of magistrates, councillors, or electors, the making up of registers, or the like; and accordingly while we think that the effect of this enactment is to make applicable to Lerwick the directions contained in sect. 9 of the act of 31 and 32 Vict., chap. 108, relative to the intimation of candidates' names to the town-clerk, and the publication of these names, we do not consider that the remaining provisions of the act 31 and 32 Vict., chap. 108, are applicable. The time for intimating the names to the town-clerk is on or before 4 o'clock on the Thursday immediately preceding the day of election; which day of election is, in our judgment, the day prescribed by the charter.

While we think that the provisions of the Ballot Act relative to the poll, and other incidental provisions now mentioned, are applicable to Lerwick, we are of opinion that if the number of qualified persons whose names were intimated as candidates was

burgh in whole or in part, and although the police commissioners under the local act were separate and distinct from the town councillors, still the burgh was "*subject to*"

identical with the number requiring to be elected, no poll would be necessary, and the burgesses might hold their meeting, and declare the nominated persons to be the magistrates and councillors in terms of the charter. Where the necessity for a poll does not arise, there is no conflict between the provisions of the charter and the Ballot Act.

For the reasons already explained, we are of opinion that section 6 of 31 and 32 Vict., chap. 108, requiring a register of voters to be made up, is not applicable to Lerwick, and that there is no statutory requirement for the making up of a register in Lerwick. But as a register is essential for conducting the poll by ballot, we think that by analogy, and from the necessity of the case, the town-clerk must make up a register; and as he has no right to judge finally who are to be comprehended in or excluded from the register, he ought, in our judgment, to make it up a reasonable time previous to the election, publish it, and give persons an opportunity of objecting to it. As the register which he may make up is not a statutory one, and is not conclusive, any errors in it either by undue admission or exclusion might not improbably lead to the whole election being quashed, or at all events to a troublesome and expensive scrutiny. For the like reason, and because all persons having the charter qualification at the date of the election are entitled to vote, the register ought not to be closed until the shortest period prior to the election which will give time for preparing papers, &c., for the ballot.

QUERY II. Assuming that the Ballot Act, 1872, is applicable, is counsel of opinion that, in the circumstances set forth, the provisions and requirements of that act, and the relative acts, have been given effect to and complied with in the recent election for Lerwick? Is the election, as conducted, valid or invalid under said acts?

Ans. 2. The provisions of the Ballot Act appear to us to have been sufficiently complied with in the recent election, and we consider that election to have been valid.

QUERY III. Supposing that the qualifications of electors and of magistrates and of councillors fall to be taken from the charter, would Messrs. Sievwright and Tait be held to be qualified in the following circumstances? Mr. Sievwright resides about 400 yards beyond the burgh boundary. He is a proprietor within the burgh, has offices, and carries on business daily there. He has a bedroom in his offices, and pays inhabited house duty. Mr. Tait lives about a mile outside of the burgh boundary, is a proprietor, and carries on business daily within the burgh, where he has an office. Counsel may be referred to the Act 3 and 4 Will IV., chap. 76, as to how residence is understood therein; and also to the clause on page 9 of the copy charter, where it is declared that the deed "shall be received, interpreted, and understood in the sense most favourable and beneficial to the community." Was the town-clerk warranted in disfranchising and disqualifying these gentlemen? and what effect, if any, has his doing so upon the subsequent procedure?

Ans. 3. We are of opinion that Messrs. Sievwright and Tait are both disqualified, as neither of them appears to us to be a resident bur-

the Act 3 and 4 William IV., c. 76.¹ In December 1872, Mr. A. R. Clark was accordingly consulted on the point by the commissioners, and returned an opinion to the effect stated above.²

VIII.—PROCEEDINGS AT THE FIRST MEETING AFTER THE ANNUAL ELECTION, INCLUDING THE ELECTION OF MAGISTRATES AND OFFICE-BEARERS.

1. Of Town Councils in Royal and Parliamentary Burghs.

137. As soon as the full number of the town council has been completed by the annual election of the third, the council will assemble in the town hall, or other usual public place of meeting within the burgh,³ at the time ap-

gess within the meaning of the charter. If we be right in this view, the town-clerk acted properly in not inserting their names in the register of voters and in refusing to publish their names as qualified candidates, and the sheriff also acted rightly in refusing to give Mr. Tait a ballot paper wherewith to vote.

¹ See section 29 of the Ballot Act, 1872, and Memorial and Opinion, Appendix XV., pp. [177] to [178], [187] to [189].

² His opinion was in the following terms:—"I am of opinion that the Ballot Act does not apply to the election of commissioners of police under the local act. By the 29th section of the act, a municipal borough means any place which is subject to the Municipal Corporations Acts, or any of them, which in a separate section are defined to mean the Burgh Reform Acts of 1833, and the Police Acts of 1850 and 1862. A municipal election is defined to be the election of any person to serve the office of a councillor or commissioner of any municipal borough. It is true that Banff is a municipal borough, by reason of being subject to the act of 1833, but I think that the election here referred to means an election under or for the purposes of one or other of the Municipal Corporations Acts. This view is confirmed by the definition which is given of 'town-clerk' in the rules. That expression includes the clerk appointed under the Police Acts of 1850 and 1862, but does not apply to the clerk acting under the Banff Police Act. Hence that clerk does not exercise the functions competent to the town-clerk by the Ballot Act."

³ When a town council finds it to be necessary to change the places at which they have been in the habit of meeting, it is not necessary for them to obtain the sanction of the Court to make the change, and the Court will not give such sanction. Magistrates of Kirkcaldy, 10 March 1826; 4 S. 547 (N. E.) 556. But see the Magistrates of Kinghorn, 10 March 1826; 4 S. 549, (N. E.) 557.

pointed by the provost, or chief or senior magistrate, and proceed to fill up the vacancies in the magistrates and office-bearers.¹ The absence of any councillor who has accepted office, and has produced evidence of being a burghess, is no ground for delaying the election of magistrates and office-bearers,—the full number of the council being completed by the election of the third and their acceptance of office, and the presence of more than a majority² of the members of council not being requisite.

138. The disability of a person holding the office of councillor, if he was not among the third elected to supply the vacancies in the council at the immediately preceding election, should not prevent the election of magistrates from proceeding.³ Nor, on the same principle, should the

¹ See the Act 3 and 4 Will. IV., cap. 76, sections 17 and 24; and 3 and 4 Will. IV., cap. 77, sections 8 and 22.

² When a majority is not expressly declared to be a quorum by any local act applicable to particular burghs, it would be held to be so at common law. See *Macnab v. Martin*, 24th December 1803; 13 F. C. 292; Mor. No. 2, Appx. Appeal, and *Tod v. Tod*, 15th June 1824; 3 S. 148 (N. E.) 101. Where a town council consisted of nineteen members, and one died, it was held that a meeting at which nine were present was not a legal meeting, as, in order to such a meeting, a majority must be present. *Masterton and Others (councillors of the Burgh of Culross) v. Meiklejohn and Others (bailie and councillors of the said burgh)*, 28th May 1805, 13 F. C. 469; Mor. No. 17, Appx. Burgh Royal. Aff. 22d March 1810; 15 F. C. Appx., 5 Pat. App. 298. In a case where the full number of a council was twenty-one, and one member died, and ten were absent, and the provost, who had a casting vote as well as a deliberative vote, concurred with the ten members present, and intimated that his casting vote was given as well as the deliberative vote, it was questioned whether the state of the vote, which would have formed an actual majority, even if all the absent members had been present and dissented, could be rendered less efficacious in consequence of their being absent. *Fraser v. Rose*, 6th July 1837, 15 S. 1250.

³ The question was raised in Edinburgh in 1848, when, at the first meeting of the town council called for the election of magistrates, it was brought under notice that a person who had been elected a councillor in a former year, and who still held office, was disqualified from not being on the roll of electors. The disqualification was first discovered when the councillor presented himself at the polling booth to record his vote, and he communicated his disqualification to the council at their first meeting; it was forthwith verified by the town-clerk as custodier of the register of voters, and the council thereupon declared the seat of the person so found to be disqualified to be vacant, and resolved to fill it up on a day named. Thereafter it was objected by several members of council, that the council not being full, the election

election of magistrates be delayed in consequence of vacancies in the council occasioned by resignations made at such time as to take effect after the election of the third. If this rule were not acted upon, the election of magistrates, etc., might be indefinitely delayed.¹

139. The meeting of the town council for the election of magistrates and office-bearers, it is commonly supposed, must, in terms of section 17 of the Act 3 and 4 Will. IV., c. 76, and of sections 13 to 16 of the Act 3 and 4 Will. IV., c. 77, be held on the third lawful day after the completion of the annual election of the third of the council, but these sections have reference to the first election of magistrates and office-bearers under these acts; and section 24 of the former and 22 of the latter act, which regulate the subsequent elections in royal and parliamentary burghs, fix no precise day, but simply direct that the vacancies shall be filled up by the council "as soon as the full number thereof shall have been completed" by the annual

of magistrates could not be proceeded with, and an adjournment was moved to allow time for the election of another councillor in the room of the person found to be disqualified, so that the council might be full when office-bearers were elected. It was resolved, however, in conformity with the opinion of the then Lord Advocate (afterwards Lord Rutherford), previously obtained, to proceed, whereupon a protest was taken against going on with the election. The Lord Provost and certain magistrates were elected, and afterwards the Lord Advocate was again consulted as to the legality of the whole procedure. His Lordship gave the following opinion:—“(1.) I remain of opinion that the elections of the Lord Provost and Bailie Tullis are valid and effectual, and not subject to doubt,—the requirements of the statute being satisfied by completion in due form of the annual election of councillors,—and the announcement of Dr. Robertson’s disability, made after the annual election was closed, throwing no difficulty in the way of the election of the magistrates and office-bearers at the statutory meeting. . . . (2.) I should not advise any new election after a successor to Dr. Robertson has been elected, and I cannot recommend any other step as necessary or advisable in the circumstances.”

¹An instance of such delay, giving rise to after question and proceedings, occurred in 1838 in the royal burgh of Banff. In consequence of a series of resignations, and of the vacancies in the council thereby occasioned, the election of magistrates was postponed till 4th December 1838. Then doubts were raised as to the legality of the election of the magistrates, owing to its not having been made at the time prescribed by the 24th section of the Act 3 and 4 Will. IV., c. 76.—viz., as soon as the full number of the council had been completed by the annual

election of the third. The practice of electing the magistrates of burghs on the Friday immediately after the election, when this can be done, is believed to be universal, and it would be unwise and hazardous¹ to change it without good reason.²

140. The meeting will be presided over by the provost if he is in office. If he is absent from any cause, or if he was included in the third part of the council who went out of office on the preceding Tuesday, the senior magistrate in office present will preside till a provost is elected

election of the third—and an application was made to the Court to appoint the magistrates to be managers. The Court ordered the petition to be intimated to the Lord Advocate; and he having stated that no objection existed on the part of the Crown, the Court, without prejudice to such rights as might of law belong to the magistrates, appointed them to be managers of the burgh, and of the trusts and charities therewith connected, with such powers as would fall to each in the special character in which he was elected. *Forbes v. Watt*, 22d December 1838; 1 D. 351. No such proceeding would have been necessary had the magistrates and office-bearers been elected in conformity with the rule stated in the text. It may be added that, in the subsequent case of *Martin and Others v. Stuart*, 25th January 1853, an opinion was expressed that the case of *Forbes* was not to be relied upon as a precedent; and Lord Ivory questioned the necessity of such appointments pending a challenge of the election, on the ground that the acts of the magistrates *bona fide* in possession were valid, notwithstanding the challenge of their election. 15 D. 312; 25 Jurist, 193; 2 Stuart, 162.

¹ *Marquis of Lothian v. Haswell*, 8th February 1738; *Elchies voce Burgh Royal*, No. 9; H.L., 14th April 1738; 1 Pat. App. 207. In this case the meeting for the election of magistrates of the royal burgh of Jedburgh being held previous to the usual day, and without due notice, was (affirming the judgment of the Court of Session) reduced.

See also *Gibson and Others v. Kerr and Others*, 20th December 1856, 19 Dunlop, 261; 29 Jurist, 111. In that case Lord Ivory observed as follows:—"I am not prepared to say that if there be good and reasonable and *bona fide* grounds for asking an adjournment, there is any statutory rule forbidding the adjournment of the day for electing magistrates. It is not as if the statute had fixed the election for a certain day, so that if not completed on that day, the election could not be completed on any other day. The council must meet on that day, but until their number is complete, they cannot elect, and therefore you are not tied up to any absolute point of time as regards the day of the election. There are, doubtless, circumstances in which the election may be adjourned, and if so, it is reasonable at least to entertain a motion for adjournment, made on sufficient grounds and in good faith."

See sections 17 and 23 of the Act 3 and 4 Will. IV., c. 76; and sections 13, 14, 15, 16, and 22 of the Act 3 and 4 Will. IV., c. 77.

and inducted into office.¹ The provost or magistrate so presiding will have a deliberative, and in cases of equality, a casting vote.² If all the persons who held the offices of provost and magistrates were included in the third who so went out of office, then, if they or any one of them are re-elected members of council, the person who held the office of provost or senior magistrate who may be so re-elected, and may be present at the meeting, will preside thereat, till a provost is elected and inducted into office, and will have a deliberative, and in cases of equality of votes, a casting vote; but if none is re-elected a member of council, the retiring provost or chief magistrate, or failing him the retiring magistrate next in seniority, must attend and preside at such meeting until the provost has been elected and inducted into office. Such retiring provost or magistrate so presiding has no deliberative vote in such meeting, but in case of equality of votes has a casting vote.³

141. After the meeting has been constituted, the town-clerk should read the minutes of all the previous steps of the election. Thereafter, if any councillor is present who was unable to attend the meeting to declare his acceptance of office, but had accepted by letter, and had produced evidence of his being a burghess of the burgh,

¹ In 1835 the Commissioners on Municipal Corporations in Scotland recommended that "it ought to be expressly provided that, in the absence of the chief or senior magistrates, the bailies and councillors, in the order of their seniority in council, should be entitled to act in their room."—General Report, p. 96.

² See section 24 of the Act 3 and 4 Will. IV., c. 76; and section 22 of the Act 3 and 4 Will. IV., c. 77.

³ See section 6 of the Act 15 and 16 Victoria, cap. 32.

The Lord Provost of Edinburgh v. The Commissioners of Police, Leith, 28th May 1828; 6 S. 873. By the statute for the regulation of the municipal government of Leith, it was enacted that at the meeting of the commissioners, the "Lord Provost (of Edinburgh) the admiral or senior bailie of Leith present, etc., or, in their absence, such one of the commissioners as shall for that purpose be chosen by a majority of the commissioners present, shall be preses." The commissioners having, in absence of the provost, chosen the senior bailie of Leith, although the admiral was present, a bill of suspension and interdict at the instance of the provost and admiral was passed.

as above explained, he will take a declaration *de fidei administratione*.

142. In Edinburgh the persons elected to the offices of dean of guild and deacon convener, or convener of trades, by the guild brethren and convenery respectively; and in Glasgow, the persons elected to the offices of dean of guild and deacon convener by the Merchants' House and Trades' House respectively, are, by virtue of such election, constituent members of the town councils of these cities, and enjoy all the powers, and perform all the functions, enjoyed or performed by such office-bearers in these cities at the time of the passing of the Act 3 and 4 Will. IV., cap. 76. The persons elected to the office of dean of guild by the several guildries of Aberdeen, Dundee, and Perth, are in like manner, in virtue of such election, constituent members of the town councils of these burghs respectively, and as such enjoy all the powers, and perform all the functions, exercised and enjoyed at the time of the passing of the act by the persons who then held the office of dean of guild in these burghs. At all annual elections under the act in these cities and burghs accordingly, only such a number of councillors are elected as, with the additions of the deans of guild and conveners, makes up the number of councillors which existed therein at the time when the act was passed. The town councils of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth are prohibited by the act from electing any other persons to fill the offices or perform the functions of deans of guild or conveners, but these offices are appointed to be held and exercised in the said councils and otherwise by the persons elected in the manner above referred to exclusively.¹ These provisions are expressly reserved

¹ 3 and 4 Will. IV., cap. 76, section 22.

On this provision the Commissioners on Municipal Corporations in Scotland made the following observations:—

“In the recent Act of Parliament relative to the election of burgh

by "The Municipal Elections Amendment (Scotland) Act, 1868.¹" With the exceptions above specified, the offices and titles of deacon, and of convener and dean of guild, and of old provost and old bailie, as official and constituent members of any town council, were declared by the Act 3 and 4 Will. IV., cap. 76,² to cease after the completion of the first election under it.

In each of Edinburgh and Glasgow, accordingly, the certificates of the election of the dean of guild and deacon convener, or convener of the trades, and in each of Aberdeen, Dundee, and Perth, the certificate of the election of the dean of guild, should be produced and read at this stage of the proceedings, and if these several office-bearers are present and accept their respective offices, they will take the declaration *de fidei administratione officii*. Whether the dean of guild who has judicial duties to discharge should take any farther declaration, is not free from doubt. The practice in Edinburgh, since the passing of the Act 31 and 32 Victoria, cap. 72, has been to administer to him the declaration appointed by

councils, a certain anomaly has been adopted in reference to a few burghs, the expediency of which we feel ourselves compelled to question.

"In each of the burghs of Edinburgh, Glasgow, Dundee, and Perth, the dean of guild, elected by the guild-brethren, and, in each of the two former burghs, the deacon convener, elected by the convenery, is, by that act, declared to be, in virtue of these elections, a constituent member of council.

"We have been unable to discover any reason why these particular corporations should be endowed with that extraordinary privilege. In the towns where this anomaly exists, even more generally than in those of an inferior class, the members of these corporations are also, with perhaps a few exceptions, qualified electors under the statute; and the practical result must be to bestow on them a double share of representation in the general council of the burgh. This we cannot but regard as an evident departure from the general principle and spirit of the act; and we therefore beg leave to recommend that those seats *ex officio* should be taken away, and that these councillors should be replaced by election. But of course the council must choose either out of their own number or otherwise, as they may think fit, a dean of guild, or other functionary, to discharge the duties pointed out for that officer under the head of Jurisdiction." [General Report, p. 94.]

¹ Section 10.

² Section 19.

that act.¹ In Glasgow the practice is for the dean to take the oath of allegiance and the judicial oath.

143. In the event of two or more vacancies having occurred in any ward, and having been filled up at the immediately previous election by the nomination of an equal number of persons to fill these vacancies, without any poll having been required, in terms of "The Municipal Election Amendment (Scotland) Act, 1870," or in the event of such vacancies having been supplied by the election of the requisite number of councillors by an equality of votes, the majority of the town council, including the councillors so elected, must determine the order in which the councillors so elected shall retire from the council.² It will be the duty of the town-clerk, therefore, to bring the facts under the consideration of the town council. When the councillors thus elected for the several wards agree as to the order in which they are to retire, they will explain the arrangement they propose, and ask the council to give effect to it, which the council may do or not do, as it pleases. If the arrangement is approved of by the council, the matter will be settled accordingly. If it is not approved of, the order of retirement will have to be determined by a vote of the council.³

144. There is an obvious convenience in having the roll of the council so prepared as to show the order in which the members fall to retire, and to have the roll formally sanctioned by the council. That may be conveniently done at this stage of the proceedings in the form of a representation by the town-clerk, submitting the names of the councillors, arranged in the order of their election—those elected say in 1873 being placed before those elected in 1874, and those elected in 1874 before those elected in 1875, and those elected in each year by a poll in which there

¹ See form of minute, Appendix xvi., No. 31, p. [224].

² See section 5 of "The Municipal Elections Amendment (Scotland) Act, 1870."

³ See form of minute, Appendix xvi., No. 31, pp. [224] [225].

was not an equality of votes in favour of two or more candidates being placed with reference to the number of votes given for each—the councillor who had the fewest votes being placed first, then he who had the next fewest votes being placed second, and so on.¹ When two or more councillors have been elected without a poll under the provisions of “The Municipal Elections Amendment (Scotland) Act, 1870,” or by an equality of votes in the case of a poll, and when the council has determined the order in which they must retire, as explained in the preceding observations, the town-clerk will, of course, give effect to such determination by arranging the roll, so that those who remain longest in office for the burgh shall be placed lowest. When a burgh is divided into wards, the councillors for each ward must be kept together, and placed in the order above explained.² The council should then declare the roll so submitted to be the roll of the council, but direct the magistrates and office-bearers to be called before the ordinary councillors, and to be so placed in the sederunts, if that is the practice in the burgh.³

¹ See No. 119 of these Observations.

² See form of representation, and deliverance of the council thereon in the minute of meeting. Appendix xvi., No. 31, p. [225].

³ The preparation of the roll of the council, in such a way as to show the order in which the councillors retire from office, was recommended by the Commissioners on Municipal Corporations in Scotland, in their General Report in 1835. On that subject they observed :—“The present statutory rule for regulating the rotation of the council is, in one particular, attended with ambiguity. It is enacted that, after the year 1835, ‘the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office;’ but the councillors being generally elected in classes, there will, in almost every case where an occasional vacancy shall occur by death or resignation, be a difficulty in fixing which individuals in the class are to be considered as having been longest in office. This difficulty might be obviated in various ways; but the most expedient mode, as it appears to us, and certainly that which with the smallest change on the existing enactments will make the statutory rotation intelligible and operative, is to make it imperative on town councils to keep a roll of the councillors in the order in which they happen to present the evidence of their having been elected, and to declare that that councillor shall be held and considered to have been longest in office, in the sense of the statute, whose name stands first entered in the roll” (p. 96). Having regard, however,

145. The council may then proceed to elect such magistrates and office-bearers as may be required to supply the vacancies occasioned by the retirement of the third of the council, or to manage the affairs of the burgh.

Section 17 of the Act 3 and 4 Will. IV., cap. 76, required the councillors of every royal burgh not included in schedule F (which schedule was repealed by section 3 of the Municipal Elections Amendment (Scotland) Act, 1868) to meet on the third lawful day after the election of the whole number of councillors in November 1833, and elect from among their own number a provost or chief magistrate, the number of bailies fixed by the set or usage of the burgh, a treasurer,¹ and "other usual and ordinary office-bearers" existing in the council at the time "by the set or usage of the burgh," and also to elect the managers of any charitable or other public institution existing in connection with the burgh, the appointment of the managers to which was vested in the magistrates and council at the time of the passing of the act.² That provision, as regards the election of office-bearers, was, however, modified by section 19, which, except in the cities and burghs mentioned in No. 142 of these Observations, and to the effect therein explained, abolished the offices and titles of deacon and of convener and

to subsequent legislation, as interpreted in the case of *Thomson v. The Magistrates of Rutherglen*, 17th February 1876, referred to in No. 119 of these Observations, the names of the councillors should now be placed on the roll, with reference, *not* to the order in which the several councillors may have presented the evidence of their election, but to the number of votes given for each, when there was inequality in the number of votes, and to the order in which the council may have appointed them to retire, in the event of their having been elected without a poll, or by an equality of votes.

¹ In 1835 the Commissioners on Municipal Corporations in Scotland made the following observations as to the office of treasurer:—"It now only remains to take notice of the office of treasurer, who in all burghs is at present a member of council; and in those burghs where there is no chamberlain, has the duty committed to him of managing the pecuniary affairs of the corporation. We are of opinion that in all cases this duty should be entrusted to an officer who is not a member of council; and that the duty of the treasurer should be confined to a superintendence of the proceedings of the chamberlain, or other officer to whom the duty of chamberlain is committed."—General Report, p. 97.

² 3 and 4 Will. IV., cap. 76, section 17.

dean of guild as official and constituent members of every town council, but empowered the councillors of every burgh in which, at the time of the passing of the act, there was a dean of guild, thereafter to elect, "by a majority," a member of the council to perform the duties and functions previously performed by the dean of guild in such council, or in any dean of guild court of such burgh. It also abolished in every town council the offices and titles of old provost and old bailie as official and constituent members of the council, and all distinctions between trades bailies and merchant bailies, or trades councillors and merchant councillors. But section 20 enacted that where, previous to the passing of the act, any trust, management, or direction was conferred on members of the council, under the denomination of old provost, old bailie, or old dean of guild, or of merchant or trades bailie, or merchant or trades councillors respectively, the town councils elected under the provisions of the act should, immediately after their acceptance and induction into office, elect from their own body such a number of persons to be such trustees, managers, or directors as were appointed to these offices before the act was passed, and all the powers and functions which formerly appertained thereto are, by virtue of such election, declared to be vested in the persons so elected.

The Act 3 and 4 Will. IV., cap. 77, fixed the number of magistrates and office-bearers to be elected in the several parliamentary burghs, and appointed the councillors elected under its provisions to meet on the third lawful day after the election of the whole number of councillors in November 1833, and elect "by a plurality of voices" such magistrates¹ and office-bearers, and also the managers of any charitable or other public institution existing in or con-

¹ 3 and 4 Will. IV., cap. 77, sections 13, 14, 15, and 16. A provost, four bailies, and a treasurer were assigned to each of Paisley, Greenock, Leith, and Kilmarnock. A provost, three bailies, and a treasurer were assigned to Falkirk, Hamilton, Peterhead, Musselburgh, and Airdrie. A provost and two bailies were assigned to Port-Glasgow, Cromarty, and Portobello, and two bailies were assigned to Oban.

nected with these burghs respectively, the appointment of the managers of which was vested at the passing of the act in the magistrates and town council of such burghs.¹ In case of equality of votes, the councillor who had the greatest number of votes at the election of councillors was empowered to give a casting or double vote.² Where, previous to the passing of the act, any trust or management was conferred on the magistrates and councils of any parliamentary burgh, the magistrates and councils elected under its provisions were declared to have the same powers and rights as such trustees, managers, and directors as previously belonged to the magistrates and councils of the burgh; and where any such trust or management was conferred on any particular members of the council, or magistracy, or office-bearers of the burgh previous to the passing of the act, the town councils elected under its provisions were required immediately after their acceptance and induction into office to elect, from their own body, the requisite number of persons to be trustees or managers, in the same way as royal burghs were directed to do.³

Both acts provided that when any magistrate or office-bearer of a royal or parliamentary burgh (other than the provost or chief magistrate and treasurer), is in the third of the council going out of office, the place of such magistrate shall be supplied by election by the council as soon as the full number thereof is completed by the election of the third.⁴

The Act 15 and 16 Vict., cap. 33,⁵ reduced the number of councillors and magistrates to be elected in 1852 and subsequent years in the several royal burghs specified in the schedule annexed to the act.⁶ The Municipal Elections

¹ Section 17.

² Sections 13, 14, 15, 16, and 17.

³ 3 and 4 Will. IV., cap. 77, section 19.

⁴ Section 24 of 3 and 4 Will. IV., cap. 76; section 22 of 3 and 4 Will. IV., cap. 77.

⁵ Sections 2 and 3.

⁶ This schedule included all the royal burghs specified in schedule F to

Amendment (Scotland) Act, 1868¹ increased, from and after December 1868, the number of magistrates to be elected in the royal burgh of Dunfermline, and the number of magistrates and councillors to be elected in the parliamentary burghs of Hawick and Galashiels.² Farther changes have also been made as regards several royal and parliamentary burghs by local Acts of Parliament.

In every royal burgh, therefore, the number of magistrates and office-bearers to be in office at one time is fixed by the usage or set of the burgh, subject to the modifications above explained, unless where otherwise prescribed by the Act 15 and 16 Victoria, cap. 35, or by any local act. The number in every parliamentary burgh is fixed by the Acts 3 and 4 Will. IV., cap. 77, and the Municipal Elections Amendment (Scotland) Act 1868, or by local acts.

Reference will afterwards be made to the period during which magistrates and office-bearers hold office.³

146. With a view to the election of the required number of magistrates and office-bearers, the clerk should state what are the vacancies to be filled up, after which the elections should be proceeded with, unless there are good and sufficient reasons for postponing them. A motion to delay proceeding with the election, if opposed, should be met by an amendment to proceed, on which nothing involving a separate issue should be engrafted. The vote should then be taken as between the motion and amendment. If the amendment be carried, every magistrate and councillor present will have an opportunity of voting for or against the several candidates who

the Act 3 and 4 Will. IV., cap. 76, except Bervie and Kintore, which still elect the number of magistrates and councillors specified in the set of these burghs respectively.

¹ Section 12.

² Hawick and Galashiels were constituted parliamentary burghs by "The Representation of the People (Scotland) Act, 1868" (31 and 32 Victoria, cap. 48).

³ See Nos. 162 to 166, both inclusive, of these Observations.

may be nominated. If, however, the motion to adjourn the election be carried, and the minority deem the adjournment to be made on insufficient grounds, and *in mala fide*, they may protest against it, proceed with the election, and have the whole question disposed of by the court.¹

If, when the elections are proceeded with, only one person is proposed for each of the vacant offices, and the election is made unanimously, no question can arise; or, if two persons are nominated for one office, a vote of the council, as between the two candidates,—the chief or senior magistrate present having a double or casting vote in case of equality,—will determine the election. But if three or more persons are nominated for an office, the question arises, in what manner is the vote to be taken? Curiously enough, no case has occurred in any of the larger burghs, so far as the writer is aware, in which it has been necessary to have this question decided.

¹ See the case of Gibson and Others v. Kerr and Others, 20th December 1856, 19 D. 261. In that case a motion was made at the usual meeting for the annual election of office-bearers of the royal burgh of Stranraer to adjourn the election. The motion was met by an amendment to proceed with the election, and to elect certain gentlemen to the offices of bailie and treasurer. On a vote, the motion was carried by a majority of ten to seven, whereupon one of the minority protested "that as no other candidates had been proposed for election at the statutory meeting, the gentlemen named by him have been duly and lawfully elected." A note of suspension and interdict was then brought by the minority to prevent the majority proceeding with an election in terms of their resolution, but it was held (*dub.* Lord Deas) that suspension was incompetent. In expressing his opinion, Lord Deas thus pointed out the irregularity which was committed: "At the meeting of 7th November, a motion was made to adjourn the election of office-bearers to a future day. This was met by what is called an amendment, but which was truly both an amendment and a motion, embracing two things quite distinct in themselves, and which ought not to have been linked together—namely, 1st, That the election be at once proceeded with; and 2d, That certain persons named should be elected. Now, if the question had been first put—'Adjourn, or proceed?'—the whole councillors present would afterwards have had a proper opportunity of voting or declining to vote for or against the particular persons put in nomination, which, as the matter was managed, they have not yet had. According to the best opinion I can form at this moment, this objection to the proceedings appears to me to be well founded, and, the case being pressed to judgment on the argument as it stands, I can only go upon this opinion." See Lord Ivory's opinion as to the competency of adjourning such elections, in footnote to No. 139 of these Observations.

The usual practice in Edinburgh is for the magistrates and council to ascertain, at a private meeting, what candidates for the several offices have the support of the largest number of members of council, and, at the public meeting, to elect these candidates without a division.¹ In Glasgow greater deference is shown to the wishes of the Lord Provost, whose selection of the magistrates and office-bearers who are to act with him is usually accepted. In contested elections, however, when three or more candidates are proposed, the practice is to take a vote first upon all the candidates, and to strike off the candidate who has the fewest number of votes, then to take a vote upon the remaining candidates, striking off the candidate who has fewest votes, and so to proceed till either one candidate receives the votes of an absolute majority present, when he is at once declared to be elected, or until only two candidates remain, when the vote is taken as between them in the usual way, the majority of votes determining the election. It has been maintained, however, that the 17th and 24th sections of the Act 3 and 4 William IV., cap. 76, do not sanction such a mode of voting, and that the candidate who has the largest number of votes on the first vote must be declared to be elected. These sections provide that the election of magistrates and office-bearers shall be "made by plurality of voices," the chief or senior attending magistrate having a double or casting vote in case of equality, and it has been argued that under them only one vote can be taken. The importance of the issue thus raised is apparent, when it is considered that under such a mode of voting, a person may, in certain circumstances, be elected by a small minority of the council. If, for example, in a council consisting of 41 members, four candi-

¹ An election by ballot would be illegal. *Watson against the Glasgow Police Commissioners*, 10th March 1832, S. & D., vol. x., p. 481. *Barclay and Others v. The Magistrates and Councillors of Montrose*, 7th June 1817, S. & D., vol. x., p. 859, Appendix.

dates were proposed, and A received 12 votes, B 11, C 10, and D 8, A would be elected although all the supporters of B, C, and D, to the number of 29, might be prepared to vote for B or C or D in preference to A. The writer consulted the town-clerks of several of the larger burghs on this point, previous to the elections of 1872, and they concurred with him in thinking that there is nothing in the provisions of the acts referred to to prevent the elections of magistrates and office-bearers from proceeding in the manner in which other elections are ordinarily conducted; and that an election so conducted would be "made by a plurality of voices" in the sense of the statutes. They, therefore, resolved, notwithstanding the opinion of eminent counsel to the opposite effect,¹ to recommend adherence to the usual mode of election in the event of any question being raised.² Of course the taking of a second or third

¹ In anticipation of the question being raised in connection with the election of a lord provost in 1851, the town-clerks of Edinburgh consulted the Dean of Faculty, now the Lord Justice-Clerk (Lord Moncreiff), and Mr., afterwards Lord, Anderson.—(1.) As to whether the town council could competently regulate the manner of taking the vote, or in any way interfere with the matter? To this question these counsel answered,—"We are of opinion that it will not be competent for the town council assembled, on the the day of election, to make any regulation affecting the manner of taking the vote. The election of the provost is regulated by statute, and the town council must abide by and act on the statutory enactment." (2.) As to how the vote was to be taken? If only once, whether it would be the duty of the chairman and clerks, even though so required, to refuse to put it a second time? and (3.) If the vote could only be taken once, would it be the duty of the chairman to declare the candidate having the greatest number of votes, even though that be a minority of the meeting, duly elected Lord Provost, and to proceed accordingly? To these questions counsel answered,—“We are of opinion that, according to the sound construction of the 17th and 24th sections of the statute, the vote must be taken only once, and that it will be the duty of the chairman to declare the candidate having the greatest number of votes, even though that be the minority of the meeting, to be duly elected Lord Provost. The statute does not warrant any other mode of proceeding.”

² After the above resolution had been come to, the writer consulted the then Solicitor-General (Mr. A. R. Clark), on the subject, and received from him the following confirmatory opinion:—

“In my opinion, the proper form of taking the vote is to strike off the candidate who has the fewest votes, and to follow out this course until no more than two remain, the vote between whom will be decisive.

vote cannot prejudice the interests of the person having the majority of votes on the first, if that should ultimately be found to be the only vote which the law recognises. He could immediately claim to have been duly elected, and protest against all subsequent voting as incompetent, and the question might thereafter be decided in a process of declarator, or other competent proceeding.

147. Except in the special case of the provost and magistrates of a royal or parliamentary burgh being *all* included in the third of the council who fall to retire, and to which reference is made in No. 150 of these Observations, the subsequent procedure in the election of the provost or chief magistrate, bailies, and office-bearers, will be as follows:—After the council has elected a person to fill the office of provost or chief magistrate, the town-clerk should call upon him to declare whether he accepts office, and if he accepts, he will take the declaration appointed by the Act 31 and 32 Vict., cap. 72, and also a declaration *de fidei administratione officii*. The presiding magistrate will then invest the provost or chief magistrate with the insignia of his office, if there be such insignia, and the newly elected provost or chief magistrate will take the chair.

148. The election of such other magistrates or office-bearers as may be necessary should thereupon be proceeded with, and when completed, the town-clerk

This is the practice which obtains in the election to offices which are within the patronage of the council, and it is, I think, in accordance with the provision of the statute, by which it is directed that the office-bearers shall be elected by a plurality of voices. It is the only way of securing that the office-bearers shall be elected by a majority of the council. I read the phrase 'plurality of voices' as meaning that the office-bearers shall be elected by a majority of the meeting.

"I do not think that it would be competent for the council to fix any other way of taking the vote. I think that the vote must be taken in such a manner as that the office-bearer shall be elected by a majority, and the only way of doing so is by following the practice which has hitherto existed, and which is, I think, the most consonant to the provisions of the act."

should call upon the persons so elected *seriatim* to declare whether they accept office. If they accept, those of them who have to exercise judicial functions should take the declaration appointed by the Act 31 and 32 Victoria, cap. 72, and all of them should make a declaration *de fidei administratione officii*. The provost or presiding magistrate should then invest them with the insignia of office, if there be such, and the newly elected magistrates and office-bearers should thereafter take the places assigned to them.

149. The practice in some burghs is to elect the provost, magistrates, and office-bearers (when such elections have to be made) in immediate succession, and then to call upon them all *seriatim* to state whether they accept, after which they take the requisite declarations, are severally invested with the insignia of office, where such insignia exist, and are inducted. Where no vote takes place in regard to the bailies and office-bearers, and where the presiding magistrate is not called on to give a casting vote, it is immaterial whether or not the provost is inducted before the election of the bailies and office-bearers is proceeded with, but if a vote in regard to them had to be taken, and a casting vote were required, the newly elected provost would seem to be the proper person to occupy the chair and to give that vote. The more prudent course appears to be to complete the election and induction of the provost, and for him to take the chair before the election of bailies and office-bearers is proceeded with.¹

¹ In December 1872 the writer submitted the point to the then Solicitor-General (Mr. A. R. Clark), in the form of the following query :—

“ In the case where a provost falls to be elected, and is elected by a plurality of voices, is it the duty of the presiding magistrate to administer the requisite oaths to the person elected, and forthwith to induct him into the office, so as to give the newly elected provost a double or casting vote in the event of an equality of votes in regard to other magistrates and office-bearers? Or, would the magistrate who presided at the election of the provost be entitled to continue to preside

150. When the provost and magistrates of a royal and parliamentary burgh have all been included in the third of the council who went out of office, the provost or senior magistrate, who may continue to be a member of council by being re-elected, and who may be present at the first meeting of the council after the annual election, should preside until the provost and magistrates have been elected, and he is entitled to a deliberative, and, in case of equality of votes, to a casting vote. When the provost and all the magistrates are included in the third, and none are re-elected members of council, then the retiring provost or chief magistrate, or, failing him, the retiring magistrate next in seniority, is required to attend and preside at such meeting until the meeting shall have elected the provost and magistrates, as the case may be, and no longer; and such provost or magistrate has no deliberative vote in such meeting, but has a casting vote in case of equality of votes.¹ In such circumstances the proper course, having regard to the express provisions of the statute, will be to proceed with the election of the provost, and all the magistrates in immediate succession, then to call upon the persons elected to intimate their acceptance, and thereafter to administer the requisite oath, and invest them with the insignia of office. Till the election of the provost and magistrates has thus been completed, the person who presides will, if a member of

throughout all the other elections, and if necessary, to give a double or casting vote, to the exclusion of the newly elected provost? ”

To that query the following answer was given :—

“ I am of opinion that the presiding magistrate ought to administer the oath to the person who is elected provost, so that he may immediately proceed with the discharge of his duties. It is only where there is no chief magistrate that any other person has a casting vote, and, in my opinion, that alternative should exist no longer than necessity requires.

“ I do not say that the proceedings would be irregular if the provost did not preside after he was elected, but allowed them to proceed under the presidency of the original chairman. I think, however, that the regular course would be, that he should take the chair as soon as he is elected, and that it would be illegal to exclude him from it if he claimed it.”

¹ See the Act 15 and 16 Vict., cap. 32, sec. 6.

council, have both a deliberative and casting vote ; but if not a member of council, will only have a casting vote in cases of equality. As soon as the election is thus completed, the newly elected provost should take the chair.¹

151. When questions arise under disputed elections, the nature and form of the proceedings to be adopted must be determined with reference to the facts of each particular case, and the remedy sought.

The Act 7 George II., cap. 16, established a summary process of petition and complaint for trying all questions regarding the election of magistrates and councillors ;² and in cases decided by the Court of Session between the date of that act and the Burgh Reform Act, it was held that such questions could only be disposed of either summarily by petition and complaint, or by the ordinary form of pro-

¹ This was the course recommended by Mr. A. R. Clark when consulted by the burgh of Aberdeen on 2d October 1866, in view of the provost and all the magistrates retiring from the council at the then ensuing annual election. The query then submitted to him was as follows : " At the meeting of the council on Friday for the election of the new provost, and for filling up the vacancies in the offices of bailies, how long does the party who takes the chair at that meeting continue to preside ? Does he leave the chair immediately on the new provost being elected, or does he remain as chairman and give his casting vote (if required) both in the election of the new provost and the new bailies ? " To that query he returned the following answer :—" The sixth section of the act declares that the retiring provost shall preside ' until the meeting shall have elected the provost and magistrates respectively.' Having regard to this enactment, I am of opinion that the safe and proper course is for the retiring provost to continue to preside until the provost and magistrates are elected. The officials so elected can then declare their acceptance of office, and be sworn in. This course is, in my opinion, in accordance with the sixth section of the act, and is not in the least inconsistent with the fifth, because the retiring Lord Provost continues in office until his successor is appointed and *comes into office*, which he cannot do until he is sworn in."

² Section 7 of that act enacted " That it shall and may be lawful to and for any magistrate or councillor of the borough who apprehends any wrong was done at any annual election, to bring his action before the Court of Session in Scotland for rectifying such abuse, or for making void the whole election (if illegal) only within the space of eight weeks after such election is over ; and the Lords of Session shall, and they are hereby expressly authorised and required to hear and determine the cause summarily, and to allow to the party that shall prevail their full costs of suit."

cess of reduction or declarator.¹ After the Burgh Reform Act was passed, however, it was held in *Thomson v. The Magistrates of Wick*, that petition and complaint was not a competent mode of trying questions of disputed municipal elections.² Subsequently the Court of Session held that the validity of elections of magistrates or councillors might be tried in a summary process of suspension and interdict, if raised before the parties whose election was challenged were inducted into office.³ But the House of

¹ *Orr v. Vallance*, 2d December 1831, 10 S., 93 ; 7 F., 90 ; see also the dictum of the Lord Justice-Clerk (Boyle) in *Watson v. The Commissioners of Police of Glasgow*, 10th March 1832, 7 F., 370, and 10 S., 481.

² *Thomson v. The Magistrates of Wick*, 8th July 1836, 14 S., 1118 ; 11 F. 912.

³ *Monteith v. M'Gavin*, 29th November 1837, 16 S., 122 ; 13 F., 118. In anticipation of the annual election of a third of the town council of the city of Glasgow, which took place on 7th November 1837, a contest for the office of councillor commenced in the first ward between M'Gavin and Stow. On 4th November a schedule of protest by Monteith and other electors acting in Stow's interest was served on the town-clerks, requiring them to expunge from the burgh register the names of M'Gavin and other parties whose claims to be parliamentary electors had been rejected by the Court of Appeal, after the list of municipal electors had been completed on 16th September, in terms of the Burgh Reform Act. This requisition the town-clerks declined to comply with. An intimation and protest by the same parties was the same day served upon M'Gavin, holding him to be ineligible as a councillor, and protesting against his induction. On 7th November Monteith and other electors, including Stow and two councillors, presented a bill of suspension and interdict against M'Gavin, concluding to have the attempt by him to encroach upon the rights of the complainers by intruding into the town council, or acting as councillor, suspended and interdicted, and himself prohibited from entering upon the office, or so acting, and also to have the provost or senior magistrate of Glasgow interdicted and discharged from declaring the election to have fallen upon M'Gavin, or recognising him as so elected, and the magistrates and council from receiving him as a member thereof. The Court sustained the competency of the suspension and interdict, M'Gavin's induction not having been completed, but refused the bill on the merits. The House of Lords, without disposing of the question of competency, dismissed the appeal on the merits. [20th July 1838, 3 S. & M'L., 290.]

M'Culloch v. Hill, 22d February 1839, 1 D., 549. In that case certain persons were elected bailies on 4th November 1836, and they accepted the office on the same day—their election and acceptance being duly recorded in the minutes. On the following day a bill of suspension and interdict was intimated to them ; and on the day subsequent to the intimation, the persons elected took the oaths of allegiance and *de fidei administratione*, and assumed their seats of office. The competency of suspension and interdict to try the question was disputed, on the ground that the election of the bailies had been completed by a

Lords, on appeal, reversed the decision in the case of Dunlop, and held suspension and interdict to be an incompetent mode of trying such a question.¹

corporate act and vote of the council which had not been challenged, and by the induction of the bailies. To this it was answered, that the election and induction had not been completed till the oaths, &c., were taken. The Lord Ordinary (Jeffrey) held the election to be completed in all respects by the votes of the councillors, and by the subsequent acceptance of the bailies in presence of the council before the bill of suspension was presented or intimated. He therefore found the suspension to be incompetent. The Second Division of the Court, however, held that the election and induction were not completed till the parties had taken the oaths; and in respect the suspension had been intimated previous to that time, they sustained the competency.

Dunlop v. Fleming, 16th December 1837, 16 S., 254; 13 F., 243. In that case two persons claimed to have been elected to the office of Lord Provost of Glasgow. Both accepted office, and took the requisite oaths; and the friends of each, respectively, protested that their candidate had been duly elected. Both candidates were in *pari casu* as regarded possession. A bill of suspension and interdict at the instance of the one candidate against the other, to have him interdicted from molesting the applicant in his office, or usurping the functions of the office, was held by the Court of Session to be competent.

¹ *Ibid*, 13 June 1839, M'L. and Rob, 547. See also the opinion of Lord Chancellor Cottenham in Monteith v. M'Gavin, 20th July 1838, 3 S. and M'L. 290.

In the case of Dunlop v. Fleming, the Lord Chancellor thus expounded the principle of the decision by the House of Lords:—

“Now for one moment I call your Lordships' attention to the effect of proceeding by the process of suspension and interdict. The result and the only result of it can be to prohibit one party, the party against whom it is directed, from exercising the functions of an office which he either is in possession of, or which he claims the right to exercise; it decides nothing as to the right of election. It may prevent one man from exercising the duties of the office, but it does nothing towards putting any other person in his place: an observation which occurred to me when your Lordships were considering the case of Monteith v. M'Gavin, in July last, and was strongly exemplified by what had then taken place, but had not then been brought under your Lordships' consideration.

“Now, the only means of trying the right of parties to any office in a corporation must be first of all to try the right of the party in possession, and then by some process to try the right of the party who claims to stand in his place. The proceeding by suspension and interdict may do the one,—it may undoubtedly displace the party in possession, not by depriving him of the office, but by prohibiting him from exercising the functions of the office. It does not declare that any other person ought to be elected in his place, but prohibits the individual from exercising the functions of the office. One, therefore, is not surprised that the learned judges, up to the time when the difficulty arose with respect to the statute of George the Second, [7 Geo., II., c. 16], considered that the proceeding of suspension and interdict was wholly inapplicable for the purpose of trying the right to an office.

“In the present case it is true that the party against whom the pro-

In view of these decisions, and of the opinion expressed by the Lord Chancellor in the case of Dunlop, the following may be regarded as the rules applicable to such cases :

cess was addressed cannot be considered as in possession of the office ; because, a question having arisen as to the mode of election, both parties having claimed to be in possession of the office, in point of law it may be considered that neither of them is actually so. Now, if the learned judges adopted this course of proceeding with the intention of deciding which of the two was really the Lord Provost of Glasgow, then they did that which in the case of *Orr v. Vallance* [*ut supra*], and in the case of *Drysdale v. The Magistrates of Kirkcaldy* [30th June, 1825 ; 4 S., 126, (N. E.,) 128], and in the other case of *Watson v. The Police Commissioners of Glasgow* [*ut supra*], to which I have referred, the judges themselves stated distinctly that it was not competent for them to do, upon that proceeding, because it would then be a proceeding to adjudicate upon the merits of an election in a case of suspension and interdict.

“ But if they proceed upon the ground that this is a mere intrusion by a stranger upon the office of a party properly elected, they could never come to that conclusion without adjudicating that the other party had been first properly elected, and then to treat the other as a stranger intruding. They could not so treat him without considering the merits of the election. It is perfectly clear that they would have first to adjudicate on the merits of the election, and then to treat the other party as a mere intruder. But that applies only where the party is actually in possession ; and if one party is not in possession, no more is the other party in possession. I apprehend it is extremely difficult to explain the course that has been adopted upon the supposition that they were acting upon that which is recognised as a competent mode of proceeding for protecting a party actually in possession of an office against the unauthorised intrusion of a stranger. But if, on the other hand, they exercised a discretion as to the merits of an election, it must have been, in their opinion, a matter free from all doubt that the party upon whose account they allowed the suspension and interdict was the party duly elected.

“ Now, it is not my intention in the view I take of this case to give any opinion as to the merits of the election ; but to this extent I think your Lordships are bound to attend to what took place. It cannot be considered a matter free from doubt and difficulty which of the parties should be held to have been duly elected, the point turning upon the construction of the act ; the construction of the act, as it is contended for by the present appellant, being that the Lord Provost for the time being, who by the act is to remain in possession of his office three years, is, according to his construction, to go out of his office at the anniversary of the day of his election ; whereas the argument on the other side is, that he is to remain three municipal years in the office, and that he shall retain his office till his successor is appointed. There appear difficulties enough on either side upon considering the different clauses of the act,—difficulties, certainly, which the Court of Session can hardly have considered before they came to the conclusion that there was no question at all to discuss between the parties ; but if there was any question to be discussed between the parties, then they were adjudicating upon the right of election, and were in a cause of suspension and

1. Suspension and interdict is the proper form of process for one in possession of an office complaining of interference or molestation in the exercise of the

interdict, deciding which of these two parties had been properly elected Lord Provost, contrary to all preceding authorities, and contrary to the doctrine which has been acted upon in all the cases to which I have referred.

“That is the state of the contest between these parties. The Court of Session have, by an interlocutor upon a bill of suspension and interdict, prohibited the one party from exercising the duties of the office, and put no other party in possession of the office, leaving the town of Glasgow just as much without a Lord Provost by any adjudication of right as it was before.

“It may perhaps be found necessary, if the Court of Session has lost the jurisdiction given to it by the statute of George II. (7 Geo. II. cap. 16), and is incapable of administering justice in the case of controverted elections in burghs in Scotland by summary proceeding,—it may be necessary that the legislature should interfere, it may be necessary that they should have the summary power given to them which they had under the statute of George II., and which it appears they have lost, with reference to the existing corporations of Scotland. Whether that ought or ought not to be done is not now the matter for consideration; but the circumstance of their having lost the power under that statute can be no reason why the power should be exercised under a jurisdiction which it appears at the time when the Municipal Corporation Reform Act was passed was found incompetent, and over and over again declared to be incompetent, for the purpose of trying elections in burghs in Scotland. My Lords, it would obviously be productive of the greatest possible inconvenience. It is impossible that justice can be done by this course. It is wholly incompetent to carry into effect that which must be the object of every Court in interfering with questions as to the validity of these elections. But then another strong reason against your Lordships sanctioning a proceeding of that character is this:—that there are already modes of proceeding which, although not summary modes of proceeding, are calculated to meet every possible case that can arise. If the party is improperly in possession of an office, it is not a matter of dispute that the Court of Session has jurisdiction, by process of reduction, to displace him from that office. If the party be not actually in possession of that office, then there is nothing to reduce. If a question arises which of two parties is properly elected, then the proceeding by process of declarator is beyond all question competent and suited to the purpose of enabling the Court of Session to adjudicate between the parties, and to say which of the two is to be considered as properly exercising the duties and functions of the office. It is very true that these are not summary proceedings; but it is equally true, as I apprehend, and not disputed on either side at the bar, that, coupled with these proceedings, the proceeding by suspension and interdict might very well be applied; so that, pending the proceeding in which ultimate adjudication was to take place, the Court might in the meantime, by virtue of this process of suspension and interdict, regulate as to the party who should happen to be in possession of the office. Whether that be or be not a course of proceeding consistent with the practice of the

office, when the right to it is not disputed, and does not need to be declared.¹

2. It is not a competent means of determining the right to an office,² and consequently cannot be resorted to, to prevent an election, or to dispossess a party in possession of an office.³
3. The right of a party to an office of which he is in possession, can only be set aside by an action of reduction.
4. The right of a party to an office which he claims can only be established by declarator.
5. When a party claims to be put in possession of an office held by another, whose election he disputes, an action of reduction and declarator is necessary.
6. In such actions of reduction or declarator, or declar-

Court of Session, it is not necessary at present to consider; it was so represented at the bar, and I find it referred to as the recognised practice in some of the cases to which I have adverted. The present question is, whether it is a wholesome practice that in the present case the Court of Session should proceed by suspension and interdict only.

“I by no means wish to be understood as giving any opinion as to whether a jurisdiction exists by suspension and interdict in other cases; it is a question of practice, which is much better left to those who are familiar with the practice of the Court of Session. But looking at the authorities which are to be found in the books, and finding this to be a question in which an interdict could not be granted without an adjudication upon the merits of the election, and finding that all the judges have laid down, in the cases to which I have referred, that it is not competent in proceeding by suspension and interdict to adjudicate upon the merits of the election, I think your Lordships will adopt the safest course by not sanctioning a proceeding which may lead to dangerous consequences, and which is contrary to all the authorities to be found in the books; but that your Lordships will adopt a much safer course, by remitting it to the Court of Session to consider what is the best course to be taken in these cases, but not permitting them to interfere with the merits of an election upon a proceeding by suspension and interdict.”

¹ *Drysdale v. The Magistrates of Kirkcaldy*, 30th June 1825, 4 S. 126; (N. E.), 128. See opinions of judges in *Orr v. Vallance*, 2d December 1831, 10 S. 93; 7 F. 90.

² See opinions of judges in *Drysdale v. The Magistrates of Kirkcaldy*, *supra*.

³ *The Lord Provost of Glasgow v. Abbey*, 3d December 1825; 4 S. 266; (N. E.), 271.

ator and reduction, all the members of council should be called as defenders.

7. When it is considered desirable that the court should, pending the ultimate adjudication of the questions in a disputed election, regulate as to the party who may happen to be in possession of office, suspension and interdict may be competently conjoined with reduction, or reduction and declarator.

A summary and inexpensive method of dealing with disputed municipal elections, and elections of magistrates and office-bearers, is much to be desired. There seems to be no reason why the powers conferred on sheriffs by the Ballot Act should not be extended so as to empower them to dispose of all such questions on petition and complaint, with an appeal to the Court of Session, limited to questions of law.

152. After the election of the magistrates and office-bearers has been completed, the council will proceed in the same way to elect the managers of any charitable or other public institutions existing in or connected with the burgh, the appointment of the managers to which is vested in the council.¹

153. It has been questioned, whether the town council of a royal burgh can meet and transact business other than the election of magistrates, although the full number of the council has not been completed by the election of the third, or by the declinature of any of the persons elected to accept office; in particular, whether in such circumstances the town council can elect such trustees, managers, or directors as they are required under section 20 of the Act 3 and 4 Will. IV., c. 76, to elect "immediately after their own acceptance and induction into office." Upon this question, Mr. George Young was consulted

¹ See sections 17 and 20 of the Act 3 and 4 Will. IV., cap. 76; sections 17 and 19 of the Act 3 and 4 Will. IV., cap. 77.

for the Town Council of Edinburgh in November 1860, and expressed the following opinion: "I am clearly of opinion that the council may lawfully proceed to business on Friday (*i.e.*, on the Friday immediately after the day of election), although the full number of the council may not be completed, in consequence of parties elected declining to accept. With respect to the particular business of electing magistrates to fill vacancies, section 24 of the Act 3 and 4 Will. IV., c. 76, is so expressed, that it is desirable, and has been the practice, to avoid questions by delaying such business till the full number of the council has been completed in the strict sense of all the vacancies being supplied by accepting councillors. But it is the phraseology of this clause, which is limited to the particular business I have referred to, which alone creates any difficulty, and I see no ground whatever for the notion, that with respect to the general business of the council, a meeting may not be held to transact it at any time. I do not think that the council is even for a day disqualified to perform its duties as a council, although, where the exigencies of business permit, it may often be very reasonable and proper to postpone the transaction of business till the vacancies occasioned by the annual retirement of a third have been supplied. I think it clear that the council would not be excused for delaying to perform a statutory duty because its number is not full."¹

154. All elections of magistrates and others to public office should be the free and spontaneous act of the electors, and nothing should be done in contemplation of such elections to prevent each elector from exercising, according to his honest and deliberate conviction, the important trust vested in him.²

¹ See form of minute of meeting, Appendix xiii., No. 27.

² See Wight's Inquiry into the Rise and Progress of Parliament, p. 354, and the cases therein referred to of Hoggan v. Wardlaw and Others, February 1734, House of Lords, 10th March 1735; 1 Pat. App. 148; and Paterson and Others v. The Magistrates and Town

2. Of Town Councils in Burghs of Regality and Barony not being Parliamentary Burghs.

155. In burghs of Regality and Barony not being parliamentary burghs, the procedure at the first meeting after the annual election of councillors, and the mode of electing magistrates and office-bearers, is regulated by the Charter or Act of Parliament by which the burgh has been erected, or under which its affairs are administered. When the charter or act is silent on the subject, the procedure must be in accordance with the set of the burgh, or be conducted in conformity with custom.

3. Of Commissioners of Police in Burghs and Places subject to the General Police Act of 1850 or 1862.

156. The General Police Act of 1850 provides that the first general meeting of the commissioners elected under it shall take place in the town-hall or other convenient place within the burgh, at twelve o'clock noon, on the first Monday after the election; and that the commissioners shall have power to adjourn to such other place as they may think fit.¹ It does not prescribe the time at which the first meeting of the commissioners, after the second and subsequent annual elections, is to be held; but it provides that when any of

Council of Stirling, 1st March 1775, Mor. 9527. Affirmed by the House of Lords, 8th November 1775. In the former case the Court of Session held a bond entered into by a portion of a body of electors, binding themselves to vote according to the opinion of the majority of their number, to be *contra bonos mores*, and therefore illegal; but found that the bonds produced were not *per se* relevant to annul an election of magistrates carried by the parties to these bonds. The House of Lords affirmed the judgment of the Court of Session as to the illegality of the bonds, but reversed the judgment as to their effect, and annulled the election. In the latter case, the Court of Session, on the authority of the case of Hoggan, held that the effect of a bond of association entered into among three leading men in the politics of a burgh, to unite and perpetuate their interests, was to annul a subsequent election of magistrates, as brought about by the undue influence of that association; and this judgment was affirmed by the House of Lords. See also No. 173 of these Observations.

¹ See section 31 of the General Police Act of 1850.

the magistrates is in the third of the commissioners going out of office, the place of such magistrate shall be supplied by election by the commissioners "as soon as the full number thereof shall have been completed by the annual election of the third."¹

The General Police Act of 1862 provides that the commissioners elected under it shall "at twelve of the clock noon on the first Monday after the first and each annual election, hold their first general meeting in the town-hall, or other convenient place within the burgh, with power to adjourn to any other day or place which they may think fit."² These provisions are quite consistent with the enactments of the Ballot Act, and must therefore still receive effect.³

All the commissioners, whether elected under the provisions of the act of 1850 or 1862, must be cited to attend every meeting, both special and statutory (except only the first meetings under the act), and the citations must be given to the commissioners personally or at their dwelling-houses or shops, by written or printed summonses issued by their clerk at least twenty-four hours before the time of meeting. The chief or senior magistrate present, or in the absence of any magistrate, one of the commissioners chosen by the meeting, presides, and the preses of every meeting of commissioners has both a deliberative and, in case of equality, a casting vote, in all matters that come before the meeting. One third of the commissioners must be present at every meeting to constitute a quorum.⁴

157. Section 31 of the General Police Act of 1850 has reference exclusively to the first general meeting of the commissioners elected for the first time under the act,

¹ See section 35 of the General Police Act of 1850.

² See section 48 of the General Police Act, 1862.

³ *Hamilton v. Garraway and others* (Commissioners of Police of Dunoon), 15th January 1875, *infra*.

⁴ See section 41 of the General Police Act, 1850.

See section 58 of the General Police Act, 1862.

but is acted upon, and has been recognised by the Court in the case of *McDonald and others v. Robertson and others* (Commissioners of Police of Maryhill),¹ as also applicable to subsequent elections. Under the provisions of that section and of section 48 of the General Police Act of 1862, every person who may consider that he ought to have been returned as a commissioner may lodge a complaint in writing, signed by him or by some person duly authorised on his behalf, with the commissioners assembled at the first meeting after the election, and they are thereupon required to remit to a committee of three or five of their number to inquire into the merits of such disputed election, and to report thereon to a subsequent meeting of the commissioners, and the report of the committee is declared to be final. In cases in which there is an equality of votes at any election, the commissioners are empowered to determine by vote which of the candidates shall be preferred. Section 48 of the act of 1862 further provides that no election or appointment under that act shall thereafter be liable to be challenged; and both section 31 of the act of 1850 and section 48 of the act of 1862 enact that no election or appointment under either act shall be quashed or set aside on account of any misnomer, omission, or other informality; that every person returned as a commissioner shall be entitled to act until, upon a scrutiny, his return shall be quashed or set aside; and that the commissioners returned shall be entitled to act, although from any cause the full number of commissioners may not be filled up.² The question whether these provisions are still operative, or are superseded by the Ballot Act, as being inconsistent therewith—on which much difference of opinion existed³—was settled by the case of *Hamilton v.*

¹ 17 May 1876. *Session Cases* (Fourth Series), vol. iii., pp. 645-651.

² See section 31 of the General Police Act of 1850, and sections 48 and 51 of "The General Police and Improvement (Scotland) Act, 1862."

³ See Memorial and Opinion, Appendix XV., pp. [177] to [183], [187], [188], [189].

Garraway and others (Commissioners of Police of Dunoon),¹ in which the First Division of the Court,

¹ 15 January 1875. Session Cases (Fourth Series), vol. ii., p. 299, Scottish Law Reporter, vol. xii., p. 257. The following passages of the note to Lord Gifford's interlocutor explain the grounds of his Lordship's judgment:—

“There is no question as to how the poll should be taken, nor as to the manner in which the ballot papers should be counted and the result declared; but the parties are widely at issue as to what shall be done when there is any dispute as to who has the true majority of votes, or when there happens to be an equality of votes for any candidate; and the question is, Whether these cases are to be regulated by the 48th section of the General Police Act of 1862, or by the 10th section of 3d and 4th William IV., c. 76? In other words, the question is, Whether the 48th section of the General Police Act of 1862 is repealed by the Ballot Act of 1872?

“The Lord Ordinary feels the question is attended with considerable difficulty, chiefly owing to the very complicated enactments of the Ballot Act, which, instead of containing a code in itself embracing the whole procedure, merely adopts, modifies, and varies, in a variety of ways, the provisions of a considerable number of previous statutes. On the whole, however, the Lord Ordinary is of opinion that the 48th section of the General Police Act, 1862, is not repealed, but, subject to the Ballot Act as to taking and declaring the poll, still regulates the election of the Police Commissioners of Dunoon.

“It is necessary to read the whole statutes together, or at least to consider their purview, and a large number of their special enactments. But, avoiding all detail, the Lord Ordinary will simply indicate the grounds upon which he has come to the conclusion above mentioned.

“1. Section 48 of the General Police Act of 1862 is not *expressly* repealed by the Ballot Act of 1872. The Ballot Act contains very carefully digested schedules of the acts and parts of the acts repealed; and although, in schedule 5th it specially repeals sections 46, 47, and 50 of the General Police Act of 1862, it leaves sections 48 and 49 untouched. Even sections 46, 47, and 50 are only repealed “so far as their provisions are inconsistent with the provisions of this act.” This very careful and partial repeal of the Police Act of 1862 is the more remarkable, as the previous General Police Act (13 and 14 Vict. 33) is dealt with in precisely the same way, the relative section of that act being left unrepealed, while sections on both sides of it are expressly repealed.

“2. Not only is there no express repeal of section 48 of the General Police Act of 1862, but the careful repeal of sections on both sides of it seems almost equivalent to an enactment in the Ballot Act that section 48 of the Police Act shall still remain in force. At least, it creates the strongest presumption that it was not the intention of the Legislature to interfere with this section 48. Sections 46, 47, and 50 are cut down, but 48 and 49, which could not have been overlooked by the Legislature, are allowed to stand. This view has the greater force when the extreme care and minuteness of the schedules are adverted to. They deal with even particular words of particular sections which words are repealed, the rest of the sections remaining in force. The object of the Legislature seems to have been carefully to weed out from a large number of

affirming the judgment of the Lord Ordinary (Gifford), held that section 48 of the General Police Act, 1862

statutes (upwards of sixty in number) everything which was inconsistent with vote by ballot, and nothing else. This, in the Lord Ordinary's opinion, is the purview of the statute, its scope and intention.

"3. The pursuer's contention that section 48 is repealed by implication by section 22 of the Ballot Act, enacting that all municipal elections shall be conducted according to the provisions of 3 and 4 William IV., 76, depends entirely upon the true meaning of the word "election." Now, the single word "election" is not defined in any of the interpretation clauses, and undoubtedly, in common language, it may be used either in a narrow or in a more extended sense. Keeping in view the spirit of the Ballot Act, however, the Lord Ordinary thinks that "election" must be confined to the choice by the constituency of its representative, either parliamentary or municipal, and must not be extended (unless a necessity arises) to proceedings which arise after the poll has been closed and declared, and which proceedings are taken, not by the constituency, but by some third party,—for example, the commissioners, the town council, or by parliament. In particular, the Lord Ordinary thinks that proceedings regarding disputed elections, or proceedings when a double return has been made, are not, in the statutory sense, part of the "election" itself, but are separate proceedings altogether, which may or may not result in a "new election" or in a scrutiny or new declaration of the "election." In short, they are proceedings regarding an election, but are not the "election" itself. The Ballot Act did not, in general, intend to affect such proceedings, except in so far as they were necessarily affected by secret voting. This might be illustrated by a consideration of a large number of the special provisions of the Ballot Act in reference to contested elections, and otherwise.

"4. The alleged implied repeal of section 48 must yield to what almost amounts to the express maintenance of that section, taken in combination with the scope and purport of the Ballot Act, and with the changes which it intended to effect.

"5. There is really no reason whatever for the repeal of section 48 of the Police Act of 1862. On the contrary, there is every reason why that section should be maintained in force, as affording in every way a cheaper, simpler, and more summary way of deciding contested and double elections in small police burghs than that provided in the case of larger constituencies and more important elections. An appeal to the Supreme Court regarding every contested election in every police burgh, is not desirable; and though a committee of three or of five of the police commissioners themselves may decide very roughly on the merits of a contested election, this is obviously better than a litigation in the Court of Session, which may outlast the term of office of the competing candidates. In like manner, when a double return is made, there is an obvious expediency in the commissioners themselves choosing between the two candidates whose votes are equal, rather than sending back the matter, it may be at a great expense to the whole constituency, and taking a new vote by ballot, as tedious, troublesome, and expensive as the election of the whole commissioners. It would require some very strong or very express enactment to abolish what seems obviously a very expedient course in such cases."

is not repealed by the Ballot Act, and is still in force. It has also been held in the case of McDonald and

On advising the case, the Lord President (Inglis) delivered the judgment of the Court, and after stating the facts and quoting the 48th section of the act of 1862, observed as follows :—

“ Now, this was a rough-and-ready way introduced by the statute of disposing of a double return. It was desirable that there should be no protracted litigation, and the form of procedure was very expedient. It is quite clear that if the section applies, and it was duly followed by the commissioners, there can be no possibility of setting aside their decision either in this court or anywhere else, because their decision is declared to be final.” He then narrated the proceedings, and said, “ The proceedings were thus properly conducted under section 48 of the Police Act of 1862.”

“ But the question remains whether sections 48 and 50 of the Police Act of 1862 are still in operation, or are repealed by the sections of the Ballot Act which have been quoted to us. The object of the Ballot Act was to introduce a new mode of voting, and I am not aware that the act has any other purpose. It is concerned with the mode of conducting elections, in the sense of taking the votes, adding them up, and thereafter declaring the result. The sections which we were particularly referred to were the 20th and 22d, which deal with municipal elections; and this election of commissioners for the burgh of Dunoon was, in the sense of the act, a municipal election. Section 20 provides that “ the poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of the act, and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election : Provided as follows.” There then occur provisions which are principally applicable to English elections. Section 22 provides for the application of the act to Scotch municipal elections, and in sub-section 2 provides,— “ This part of this act shall apply to Scotland, subject to the following provisions :—(1) The term “ mayor ” shall mean the provost or other chief magistrate of a municipal borough, as defined by this act : (2) All municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in schedule C. to the act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy-six, intituled ‘ An Act to alter and amend the laws for the election of the magistrates and councillors of the royal burghs in Scotland,’ are directed to be conducted by the acts in force at the time of the passing of this act as amended by this act ; and all such acts shall apply to such elections accordingly.” Now, this is a little awkwardly expressed, but the meaning is clearly that municipal elections shall be conducted in the same way as in royal burghs by the statutes now in force as amended by the Ballot Act. Now, the way in which the statutes in force were amended by the Ballot Act, was by the introduction of secret voting instead of open voting as these statutes provided. We must take the statutes with that addition of the Ballot Act. It is said that an election can no longer be conducted under the act 1862 on account of sections 20 and 22 of the Ballot Act. The manner of election is now regulated by the Municipal Election Act, 1870, as amended

others *v.* Robertson and others, that the corresponding

by the Ballot Act. But the inference which the pursuer deduces is that sections 50 and 48 of the act of 1862 are repealed because they are inconsistent with the act 3 and 4 Will. IV., c. 76, and the Ballot Act. If sections 50 and 48 were sections regulating the mode of conducting elections within the meaning of sub-section 2 of the 22d section of the Ballot Act, the inference would be irresistible. But I apprehend that it is not so. Let us see what is said to have been done inconsistent with 3 and 4 Will IV., c. 76. That act requires by section 15 that elections shall take place on the first Tuesday of November. Therefore, says the pursuer, if that act is in force, an election on 19th October is bad, because that is not the day prescribed by the statute. But, reverting to the words of the 22d section of the Ballot Act, we see that it refers to the Municipal Election Acts only in reference to the provisions which regulate the manner of conducting elections. What does that mean? It means that the taking and summing up the votes, and declaring the result, are to be governed by the Ballot Act and the statutes in force at the passing of that act. But does the fixing the day for the election fall within this provision? Certainly not. Fixing the day for the election is antecedent to the election altogether, and the manner of conducting the election is not affected thereby.

"It is true that section 50 of the Police Act of 1862 is repealed by the Ballot Act, but it is repealed with a qualification. The fifth schedule appended to the Ballot Act repeals, *inter alia*, the 50th section of the Police Act, "so far as their provisions are inconsistent with the provisions of this act." Now, section 50 of the Police Act is in some respects quite inconsistent with the provisions of the Ballot Act, and to that extent it is repealed. Thus it provides that one-third of the commissioners are annually to go out of office, and their places are to be supplied by an equal number chosen "in the manner foresaid, under all the rules, regulations, and provisions applicable to such first election." Now, these rules, regulations, and provisions provided for open voting, after the old fashion, and are therefore necessarily repealed. But otherwise the 50th section, not being inconsistent with the Ballot Act, is not repealed. The Ballot Act dealing with secrecy of voting, the fixing of a day for election does not fall under its provisions.

"As to the 48th section the matter is still more clear. It is said that it is repealed, because under section 10 of 3 and 4 Will. IV. a new election is the only remedy for a double return. But what is to take place in case of a double return is not a question as to the manner of conducting the election, and so does not fall under section 22 of the Ballot Act. The manner of conducting the election ends when the return is made. Here the return has been made, and the question as to the double return must be dealt with under the 48th section of the Police Act. The police commissioners, when they met after the election, were desired to choose one of the two candidates, who were returned as having an equal number of votes. They did so, but that was not an election; it was rather, what is called by the act, an appointment. The election was over, and resulted in a double return, and what was done afterwards was only a remedy for that difficulty. In like manner, the provisions of the 10th section of 3 and 4 Will. IV. have nothing to do with this. In case of a double return, there is no doubt in that section a provision that there shall be a new election, which is to be begun again from the beginning, but the providing that an election is to take place is neither part of the old nor of the new election. It is

provisions of section 31 of the General Police Act of 1850 remain operative.¹

very remarkable that while several sections of the Police Act of 1862 are repealed, section 48 is not mentioned at all, and, by way of contrast, that gives a very strong argument that it is still in force. I am therefore of opinion that, as regards the objection founded on the 22d section of the Ballot Act, the pursuer's case is not well founded."

¹ 17 May 1876. Session cases (Fourth Series), vol. iii., pp. 645-651; Scottish Law Reporter, vol. xiii., p. 426. In that case it was objected to the validity of an election of Police Commissioners in Maryhill, *inter alia*, that in contravention of section 34 of the General Police Act 1850, and of section 5 of the Amending Act of 1868, "voters to the number of from 300 to 400 voted at the election," who had not paid their rates, and the pursuers sought to have the ballot papers transmitted to the Court of Session with a view to a scrutiny on that objection. Lord Young dismissed the action, observing on this point—"Such a scrutiny in a common law action of reduction and declarator would certainly be inconvenient and costly, and I think contrary to the spirit and meaning of the statutes regulating police burgh elections. It is provided, no doubt, that the votes of persons in arrear of their rates shall be null and void, but this does not affect the validity and finality of an election which is not questioned in terms of the acts. Now, in order to promote general public convenience by excluding such a litigation as the pursuers propose, regarding a matter so temporary and of such limited interest as the election of a commissioner under the police acts, it is, in my opinion, allowable to construe the acts as meaning and intending, and in effect providing, that any election which is not challenged in the summary and commodious manner provided by section 31 of 13 and 14 Vict., c. 33, shall be deemed to be valid and final, to the exclusion of any such objection to votes as I am now considering. The procedure there provided applies only when the seat is claimed (as it is here) by a disappointed candidate, but I am disposed to think it is according to the true meaning of the act that when no such claim is made the objection shall be final, as against such an objection as that here presented. I so limit the proposition, because there may be objections of a character to warrant action in this Court. I can have no doubt of the power of a committee of commissioners to recover the ballot papers. See Ballot Act, section 64, (b. a.)" The First Division of the Court affirmed the Lord Ordinary's decision, and in delivering judgment the Lord President said:—"The second objection is that a number of the votes which were admitted were bad, because the electors who tendered them had not paid their taxes. This would involve an enquiry as to which electors voted for each of the candidates, or, in other words, a scrutiny of votes. If there is to be any scrutiny of votes, the only competent mode of having it done is by a committee of the commissioners under section 31 of 13 and 14 Vict., c. 33, and their decision is final." And Lord Deas added: "The second objection is that a number of electors voted who had not paid their assessments, and it is contended that there ought to be a scrutiny of votes in this court. Upon that point I concur in holding that there can be no scrutiny except under section 31 of 13 and 14 Vict., cap. 33, and that the enquiry can only take place before a committee of the commissioners, whose decision is final."

158. The General Police Act of 1850 provides that in the event of any commissioner refusing to act, the vacancy so occasioned shall be supplied by the remaining commissioners.¹ The General Police Act of 1862 contains the more specific enactment, that if any person elected as a commissioner fails to attend the first meeting after the first and each annual election, he shall be held to have declined the office of commissioner, unless he transmit to the meeting a sufficient written explanation, signed by himself or his agent, of the cause of his absence, and intimating his acceptance;² and in that case the remaining commissioners are empowered to nominate a person duly qualified to supply the vacancy.³ The person so nominated is declared by both acts to have the same powers and privileges as the person in whose stead he is nominated, and remains in office until the next period of election, when he goes out of office, and the vacancy must be supplied by the householders of the burgh or ward of the burgh in which the vacancy has occurred.⁴ These provisions are different from the enactments of the act 3 and 4 William IV., c. 76, which require the provost or chief or senior magistrate to order a new election in all cases in which persons elected fail or refuse to accept; but section 36 of the act of 1850, and sections 52 and 55 of the act of 1862, are not expressly repealed by the Ballot Act, and on the principles recognised by the Court in the Dunoon case, it is thought the provisions of these sections must still receive effect.

159. If the householders at any time refuse or neglect to elect the whole or any part of the number of commissioners required, the General Police Act of 1850 empowers the commissioners who held office immediately before the

¹ See section 36 of the General Police Act 1850.

² See section 52 of the General Police Act 1862.

³ See section 55 of the General Police Act 1862.

⁴ See section 36 of the General Police Act of 1850, and section 55 of the General Police Act 1862.

time specified for the election to supply the deficiency.¹ The period during which the person so elected is to hold office is not specified, and in the absence of any provision to the contrary, it would rather appear that he is entitled to be dealt with in every respect as if he had been elected by the householders in the usual manner.

The Act of 1862² confers power on the commissioners who held office at the time when such election should have taken place, to supply the deficiency by such and the like proceedings as are provided for in the case of *interim* vacancies.³ But the time during which the person so nominated is to hold office is not specified; and it may be held that nomination by the commissioners, in default of election by the householders, is equivalent in every respect to such election. How far the powers thus conferred on commissioners are consistent with the enactments of the Ballot Act, and are still operative, is a question on which there is little room for difference of opinion. Nominations by commissioners of persons to supply vacancies in the commission, are in the same position as *interim* elections of town councillors of royal and parliamentary burghs, and are not affected by the Ballot Act, which has exclusive application to cases in which the right of election belongs to the householders or qualified electors of the burgh.⁴ The provisions of section 37 of the act of 1850, and of section 56 of the act of 1862, must therefore, it appears to the writer, still receive effect.

160. The commissioners returned at the first election under the act of 1850 are appointed by that act to be arranged alphabetically according to their surnames; and when the burgh is divided into wards, the commissioners for each ward are directed to be kept in separate lists.⁵

¹ See section 37 of the General Police Act 1850.

² See section 56 of the General Police Act 1862.

³ See section 55 of the General Police Act 1862.

⁴ See No. 171 of these Observations.

⁵ See section 31 of The General Police Act 1850.

And the commissioners elected at each subsequent annual election are appointed to be arranged alphabetically, according to their surnames, and placed at the foot of the list of commissioners; or, where the burgh is divided into wards, at the foot of the list of commissioners for their respective wards.¹ The order in which the names of the several commissioners occur on this list determines the order in which the annual retirement of the third takes place.² By the act of 1862, as has been already observed, the order of retirement of commissioners under it is determined in the same way as that of councillors in royal burghs,³ that is to say, the third of the commissioners who at the first election had the smallest number of votes go out at the expiry of the first year, the third who had the next smallest number of votes go out at the expiry of the second year, and thereafter the retiring third consists of those who have been longest in office. When there has been an equality of votes, the other commissioners remaining in office are required to decide, at a meeting convened for the purpose, which commissioner having an equality of votes shall go out of office. But no provision exists for determining who are to form the third who must retire at the expiry of the first and second year in the case of commissioners elected at the first election without a poll, by reason of only the required number having been nominated. No poll having taken place, the provision as to equality of votes is inapplicable. In such a case probably the best course to adopt is to apply the principle recognised by the Municipal Elections Amendment (Scotland) Act, 1870 (33 and 34 Vict., cap. 92), and let the majority of the commissioners determine the order in which all the commissioners shall retire. The declaration *de fidei* might then be administered to each commissioner in the order so determined,—the first retiring commissioner

¹ See section 33 of The General Police Act 1850.

² *Ibid.* See No. 25 of these Observations.

³ See section 51 of the General Police Act 1862, and No. 25 of these Observations.

taking the declaration and his seat as a commissioner first, then the next retiring commissioner, and so on. After all the commissioners have thus separately taken the declaration and their seats, their names will naturally be arranged on the roll in the order in which the declaration has been taken, and in which it has been determined that they shall retire, those going out of office first being placed at the top of the roll. When a burgh is divided into wards, the names of the commissioners for each ward will be arranged together in the order of retirement. On this subject reference may be made generally to Nos. 119, 143, and 144 of these Observations.

161. At the first meeting, or at an adjourned meeting of commissioners under the General Police Act of 1850 or 1862, the commissioners are required, by a plurality of "voices" or "votes"¹ (the commissioner who had the greatest number of votes at the election of commissioners having a casting or double vote in case of equality), to elect from among their own number a senior and two junior magistrates of police.² When any magistrate of police is in the third of the commissioners going out of office, the place of such magistrate must be supplied by election by the commissioners as soon as the full number thereof shall have been completed by the annual election of the third—the election being made by plurality of voices, and the senior magistrate of police having a double or casting vote in case of equality. In the absence of the senior magistrate, the act of 1850 empowers the casting vote to be given by the commissioner whose name is found highest on the poll; while the act of 1862 authorises the casting vote to be given by the preses of the meeting, to be chosen by the meeting.³ Under neither act do junior magistrates

¹ The word "voices" is used in the act of 1850; the word "votes" in the act of 1862.

² See section 32 of the General Police Act 1850, and section 49 of the General Police Act 1862.

³ See section 35 of the General Police Act 1850; section 54 of the General Police Act 1862.

seem to have any right, *ex officio*, to preside at these meetings in the absence of the senior magistrate, as they have at all other meetings, special and statutory.¹ Outgoing magistrates of police may at all times be re-elected.²

As to the mode in which the election of police magistrates is to be conducted, and the vote taken, reference may be made generally to Nos. 146, 147, 148, and 149 of these Observations.

¹ See section 41 of The General Police Act 1850, and section 58 of The General Police Act 1862.

² See section 35 of The General Police Act 1850, and section 54 of The General Police Act 1862.

IX.—PERIOD FOR WHICH MAGISTRATES AND OFFICE-BEARERS ARE ELECTED.

1. In Royal and Parliamentary Burghs.

162. The provost or chief magistrate and the treasurer of every royal and parliamentary burgh, when elected at the annual election of magistrates and office-bearers, are entitled to remain in office for the period of three municipal years from the time of their appointment to these offices respectively.¹ This tenure of office is not affected by the date of their election as councillors, and if their appointment as provost or treasurer has been made after one or two years' service as councillors, it has the effect of prolonging their official connection with the council for one or two years, as the case may be.²

¹ See section 24 of the Act 3 and 4 Will. IV., c. 76 ; and section 22 of the Act 3 and 4 Will. IV., c. 77.

See dictum of the Lord Justice-Clerk (Boyle) in the case of *Dunlop v. Fleming*, 17 December 1837, 16 S. 254 ; 13 F. 243 ; and *Whyte v. Scott*, 26 Nov. 1851, 14 D., 105 ; 24 Jur., 29 ; 1 Stuart, 67. In the latter case it was held that a provost of a royal burgh holds office for three municipal and not for three natural years, and that on the expiry of the three years he goes out of office both as councillor and provost, on the first Tuesday of November, the day fixed by the statute for the annual election of councillors.

It is to be observed, however, that the act 15 and 16 Vict., cap. 32, which was passed in 1852, provides for the case of the provost and magistrates of royal burghs being *all* included in the one-third of the council going out of office. See No. 165 of these Observations.

² See also the dictum of the Lord President (Inglis) in *Thomson v. the Magistrates of Rutherglen*, 17 February 1876. "The 24th section of the statute provides that the provost shall always remain in office for the period of three years, and that has been construed by universal practice, and very reasonably so, to mean that the provost is to have three years' tenure of office after his appointment to that particular office, irrespective of the date at which he was elected to the council and of the date at which he should have gone out of the council." [*The Scottish Law Reporter*, vol. xiii., p. 296 ; *Session Cases (Fourth Series)* vol. iii., 451 at p. 456.]

163. No corresponding provision exists with respect to the bailies, whose tenure of office as magistrate is co-extensive with their tenure of office as councillors.¹

164. The persons elected by the council to be managers of charitable or other public institutions, in terms of No. 152 of these Observations, and also to be trustees, managers, or directors under any acts, charters, or deeds, in terms of No. 153 of these Observations, hold office only for a year, unless the acts, charters, or deeds referred to otherwise direct.

¹ At the annual election of magistrates in Edinburgh in November 1862, it was maintained that the bailies were only entitled to hold office for a year, and that they should be annually elected, and a motion affirming this view was proposed. Acting, however, on the advice of the writer, as then town-clerk, the presiding magistrate ruled the motion to be incompetent. Against this ruling the mover of the motion protested, for reasons to be afterwards given in. The consideration of the question was accordingly resumed at the following meeting, on 18th November 1862, in connection with the reasons of dissent, which, however, the dissenter delayed to lodge until the town-clerk should have stated the result of his further consideration of the question. The minutes of council contain the substance of the following statement, which fully explains the resolution then come to:—

The town-clerk stated that immediately after the last meeting of the council he had looked more carefully into the Burgh Reform Act, and the acts amending it, and he was prepared to adhere to the opinion he had formerly expressed.

In 1834 it had been proposed by the town council of Edinburgh to take the opinion of eminent counsel upon the question, but before doing so the then town-clerks were requested to communicate with the town-clerks of other burghs in Scotland, and to get their views on the subject. From the replies of the town-clerks of Dundee, Glasgow, Aberdeen, and Perth, it appeared that all of them concurred with the town-clerks of Edinburgh in the opinion that when a councillor was elected a bailie he was entitled to hold the latter office till the expiration of the period for which he continued in office as a councillor. The town council, after full consideration, were satisfied of the soundness of that opinion, and it had been invariably acted upon in Edinburgh since that time.

The following opinion had also been obtained by the town council of Ayr on the same question in 1834, from the then Lord Advocate, afterwards Lord Murray:—"My opinion is asked as to the election of bailies under the Reform Act in the present and future years. It appears to me that a person chosen a bailie continues to hold that office during the period for which he continues in office as a councillor, and that no new election of bailies becomes necessary, excepting in the case where the persons formerly chosen are comprehended in the third going out. This seems to comprehend the whole question put to me. The bailie in the burgh of Ayr, not in the third going out, will continue to hold that

165. When the provost and magistrates of a royal or parliamentary burgh are *all* included in the third of the council who went out of office, they nevertheless retain and continue to exercise all the powers and functions of their several offices of provost and magistrates respectively until their successors are elected and come into office, with the single exception of not being entitled to act and vote as councillors.¹ The same rule applies also, as has been seen, to the case of the provost and *all* the magistrates going out of office as *magistrates*, though they may not be included in the third of the council who retire.²

166. Differences of opinion exist as to the effect of the

character without any new election, and his colleague must be elected by the council, after it is filled up by a new election, in room of the bailie who retires." And about the year 1854, the then Lord Advocate, now the Lord President (Inglis), gave an opinion to the same effect, on a memorial for the town-clerk of Stranraer. "From that memorial it appeared that, in Stranraer, previous to 1853, the practice of an annual election of bailies existed, but the town-clerk, having become impressed with the opinion that the practice was illegal, consulted the Lord Advocate—"Whether the town council of Stranraer had acted in conformity with the statute in making the election of the bailies and other office-bearers, other than the provost and treasurer, an annual one; and if not, whether the council would be warranted in departing from that course in the ensuing election, and in supplying the place of those office-bearers only who are in the third of the council then going out of office?" The answer to that enquiry was as follows:—"Construing the 17th and 24th sections together, I am of opinion that when a councillor has been elected bailie, he continues a bailie without re-election, until he goes out of the council as one of the retiring third. The statute recognises no other mode of terminating his tenure of office as a bailie except as ceasing to be a councillor. The practice of Stranraer is, therefore, not in conformity with the statute, and ought to be altered."

Fortified with these opinions, than which none could be obtained of higher authority, and having regard also to the opinion of the judges in the case of *Dunlop v. Fleming*, 16 December 1837; 16 S. 254; 13, F. 243, the town-clerk of Edinburgh advised the town council to adhere to their previous practice, and this advice was adopted.

¹ See the Act 15 and 16 Vict., cap. 32, section 5; and No. 33 of these Observations.

In the case of *White v. Scott*, Nov. 26, 1851, 14 D. 105, 24 Jur. 29, 1 Stuart 67, the election of councillors for the burgh of Banff, in November 1847, was held null and void in consequence of the late provost, who was himself a retiring councillor and a candidate for re-election, having presided thereat. But the above statute now prevents such a result in the cases referred to in the text.

² See No. 33 of these Observations.

enactments, "that the provost or chief magistrate and the treasurer shall always remain in office for the period of three years." By some it is maintained that if a councillor is elected provost or treasurer, after having served say two years as a councillor, his connection with the council is prolonged for two years after the period when he must have retired as a councillor, solely in virtue of his holding the office of provost or treasurer, and that if he resign his office at any time during the currency of these two years, he thereby incurs "disability," in the sense of the acts 3 and 4 Will. IV., caps. 76 and 77, and *eo ipso* ceases to be a councillor. By others it is maintained, that while his resignation as provost or treasurer during those two years, if made to take effect at the annual period for electing councillors, would vacate his place as councillor, and necessitate the election of another on the first Tuesday of November, he may at any other time during these two years resign his office of provost or treasurer, but still retain his seat as a councillor till the next annual election. Though the latter view appears to have been held by high authority,¹ the writer is unable to accept it,

¹ The question above indicated was raised, though under somewhat special circumstances, in the burgh of Lanark, in April 1855. As treasurer of that burgh, Mr. John Gray was entitled to hold office for the year from November 1854 to November 1855. He did not therefore retire in November 1854, as, but for his election as treasurer, he would have had to do, though his election as councillor only took place in November 1852. After the municipal election in 1854, Mr. Gray intimated his intention to resign the office of treasurer, and on 9th April 1855 he placed his formal resignation as treasurer in the town-clerk's hands; but it contained the following proviso,—“declaring that this resignation shall not be construed so as to include the office of councillor, to which I was elected by the electors.” Thereupon the town-clerk convened the council, including Mr. Gray, for the purpose of filling up the vacancy in the treasurership, but a protest was taken against Mr. Gray's name being included in the sederunt as a member of council, on the ground that he was a member of council only in virtue of his holding the office of treasurer, and that his resignation of that office vacated his seat in the council. In these circumstances, Mr. E. F. Maitland, afterwards Lord Barcaple, was consulted on the following points:—

(1.) Whether Mr. Gray, having resigned the office of treasurer, his qualification as councillor also falls? or Whether the reservation in his resignation can have any effect in reserving to him the office of councillor?

and he ventures to think that the former is more consistent with the spirit of the acts, and with a sound construction of their enactments. The exceptional provisions in favour of the provost or chief magistrate and treasurer, seem to have been introduced in consideration of the special nature of their duties, and of the importance of preventing such frequent changes in the persons holding these important offices as would otherwise have taken place. The privilege, as it appears to the writer, is inherent in and inseparable from the office of provost or treasurer, and he is unable to see that it can be transferred, even to the effect of allowing the treasurer of a burgh to be elected provost after the

To that query he replied,—“I am of opinion that Mr. Gray’s qualification as a councillor does not fall by his resignation of the office of treasurer. Although it was solely in virtue of his holding the office of treasurer that he was exempted from the necessity of going out as a councillor at the last annual election, I conceive that that occasion being past before his resignation, and another councillor (Bailie Smith) having then gone out in place of him, there is no room for holding that he must at present go out, on the ground that he has served his statutory period as councillor. It is, I think, only at the time of the annual statutory election that any councillor can be required to go out upon this ground. It therefore appears to me that the question as to Mr. Gray’s right to continue a councillor until the next annual election depends entirely upon whether it is competent under the 26th section of the Burgh Reform Act (3 and 4 Will. IV., c. 76), for a magistrate or office-bearer to resign his magistracy or office without also resigning his councillorship. I am not aware that this point has ever been judicially decided; but, I think that upon a sound construction of the statute, a magistrate or office-bearer may resign his magistracy or office without also resigning his councillorship. And I see nothing in Mr. Gray’s position to make it less competent for him than for any other magistrate or office-bearer to resign his office and continue to hold his councillorship.”

(2.) If counsel be of opinion that he has no right to sit as a councillor, whether are the town council entitled, under the intimation given, to elect another councillor as well as treasurer in his place? or are any, and what proceedings in Court necessary upon their part to prevent him from acting and voting as a councillor? To that query he replied,—“As I think that it is competent for Mr. Gray to sit as a councillor, it is unnecessary to answer this question.”

(3.) Whether counsel would recommend to the council to fill up the office of treasurer without first electing another councillor? To that question he replied,—“I think that the council should fill up the office of treasurer, and that it is not competent for them at present to elect another councillor, as, in my opinion, no vacancy in the council has taken place.”

lapse of the period when, but for his election as treasurer, he would have to retire from the council.¹

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

167. In burghs of regality and barony not being parliamentary burghs, the period for which magistrates and office-bearers are elected is regulated by the Charter or Act of Parliament by which the burgh has been erected, or under which its affairs are administered. When the charter or act is silent on the subject, the procedure should be in accordance with the set of the burgh, or be conducted in conformity with custom.

3. In Burghs and Places Subject to the General Police Act of 1850 or 1862.

168. The General Police Act of 1850 provides that the senior magistrate of police shall always remain in office for the period of three years, and that he, as well as the junior magistrates, shall at all times be capable of being re-elected.² The General Police Act of 1862 contains a similar provision,³ with the addition that, for the purpose of enabling the senior magistrate to remain in office for three years, he shall be held to have had the largest number of votes at the first election, and to have been the shortest period in office at all elections subsequent to the third election under that act.⁴ These provisions must be understood as referring exclusively to elections of senior magistrates of police made at the annual period of elect-

¹ The views expressed in the text were confirmed in October 1874 by the then Dean of Faculty, Mr. A. R. Clark, who, in answer to a query addressed to him by the writer, stated as follows: "There is great uncertainty in the matter; but I am inclined to think that the provost and treasurer only continue members of the council in order to the execution of their offices, and that they would cease to be councillors by ceasing to hold the offices in virtue of which their existence as councillors was prolonged."

² See section 35 of the General Police Act, 1850.

³ See sections 51 and 54 of the General Police Act, 1862.

⁴ See Section 51 of the General Police Act, 1862.

ing magistrates. When, during the course of the year, a senior magistrate dies, resigns, or becomes disqualified, the person nominated to supply the vacancy so occasioned remains in office as senior magistrate only till the next period of annual election, when he goes out of office. All vacancies in the office of commissioner must then be filled up by the householders of the burgh or ward, and all vacancies in the magistracy must be filled up by the commissioners, after the annual election of the third has been completed.¹

Considerable diversity of opinion exists as to the effect of the enactment "that the senior magistrate shall always remain in office for the period of three years." In the act of 1850 these words occur in the 35th clause, which provides for the supplying of vacancies in the magistracy by reason of any magistrate being in the retiring third of commissioners. In the act of 1862 the equivalent provision occurs in the 51st section, which deals otherwise exclusively with second and subsequent annual elections to supply vacancies in the commissioners occasioned by the retirement of the third—the supply of vacancies in the magistracy by reason of any magistrate being in the retiring third being provided for by section 54. The words in the 51st section are also followed by a provision to the effect that, for the purpose of keeping the senior magistrate in office for three years, "he shall be

¹ See section 36 of the General Police Act of 1850.

See section 55 of the General Police Act of 1862.

The phraseology of these sections is unfortunate. It provides for the nomination by the remaining magistrates and commissioners of persons to supply vacancies occasioned, during the course of the year, by the death, resignation, or disability, not only of commissioners but of magistrates. The person so nominated, it enacts, shall remain in office till the next period of election, when he shall go out of office, and the vacancy shall be supplied by the householders of the burgh, or, if the burgh be divided into wards, by the householders of the ward. These enactments, literally interpreted, give the householders power to supply vacancies not only in the office of commissioner, but in that of magistrates of police, when such have been created by the retirement, at the annual period of election, of persons nominated to supply *interim* vacancies in the magistracy. This can scarcely have been intended, and the law and practice of royal and parliamentary burghs is opposed to it.

held to have had the largest number of votes at the said first election, and to have been the shortest period in office at all elections subsequent to the third election under this act." Some are of opinion—(1.) That every person elected a senior magistrate of police at the annual period of election of magistrates, is entitled to hold office for three years from the date of his election as magistrate, though the period during which, but for such election, he would have been entitled to hold office as a commissioner, expires sooner. In other words, it is maintained that, in police burghs, election as a senior magistrate has the same effect as in royal burghs election to the office of provost or treasurer, viz., it secures for the senior magistrate, equally with the provost or treasurer, a three years' tenure of office, irrespective of the period during which he might be entitled to hold office in virtue of his election as a commissioner or councillor. If, therefore, the election of a person to the office of senior magistrate has been made after he has served one or two years as a commissioner, his election as senior magistrate has the effect of prolonging his official connection with the commission for one or two years, as the case may be. Others hold—(2.) That election as a senior magistrate entitles the person elected to hold the office for three years from the date of his election as a commissioner, but cannot extend his connection with the commission beyond three years, under any circumstances. Some, again, while adopting that view, hold further—(3.) That if a senior magistrate retires from the commission as one of the third, during the currency of three years from the date of his election as senior magistrate, but is returned as a commissioner, he is entitled, without re-election as senior magistrate, to assume that office and complete his three years' tenure of it.

Of these three views the writer prefers the first; he sees no ground for accepting the third.

As regards the enactment in the act of 1850, it occurs, as has been pointed out, in the section which provides

exclusively for supplying vacancies in the magistracy, and declares, without qualification, that the senior magistrate shall *always* remain in office for the period of three years, the object being to assimilate the law and practice of police burghs, in regard to this matter, to that of royal and parliamentary burghs, and to confer on the community of police burghs similar benefits to those which the higher class of burghs derive from the corresponding enactments in the acts 3 and 4 Will. IV., cap. 76, and 3 and 4 Will. IV., cap. 77. The question, as it presents itself under the act of 1862, is somewhat complicated by the fact that the enactment occurs in a section which otherwise provides exclusively for the determination of the third of the commissioners who are to retire annually, and that it is accompanied by the declaration that for the purpose of the senior magistrate remaining in office for three years, "he shall be held, &c." The enactment in the act of 1860 is, however, equally absolute with that in the act of 1850. "The senior magistrate of police *shall always* remain in office for three years;" there is no indication of an intention to alter the law as regarded senior magistrates of police burghs. The policy of maintaining it appears to the writer to be clear; and though it might have been better had the provision occurred or been referred to in sections 49 and 54, there was an obvious reason for its being inserted or referred to in section 51. That section regulated the manner of determining the third of the commissioners who fall to retire annually; and the appointment that the senior magistrate *should always* remain in office for three years could not fail in certain circumstances to create disturbance in the ordinary system of rotation, which had to be taken into account and provided for. The enactment following the words, "and for that purpose," as the writer reads it, means nothing more nor less than this—Given a senior magistrate, elected to that office at the annual election of magistrates in say 1876, he shall, with a view to the annual elections of commissioners in 1877 and 1878,—

whatever may have been the date of his election as a commissioner,—be held “to have been the shortest period in office,” and so the last to go out, till he shall have completed his three years’ tenure of office as senior magistrate at the annual election in 1879, when he must, of course, retire both as senior magistrate and commissioner, and be included in the retiring third of commissioners for that year. The vacancy in the magistracy so occasioned will then be supplied under the provisions of section 54 of the act of 1862. This is, in effect, what is prescribed by section 35 of the act of 1850.

X.—MODE OF SUPPLYING VACANCIES OCCASIONED BY RESIGNATION, DEATH, OR DISABILITY.

I. In Town Councils of Royal and Parliamentary Burghs.

169. Any person elected and accepting the office of councillor, magistrate, or other office-bearer, may resign his office at any time upon giving not less than three weeks' notice of such his intention, by a written intimation to the town-clerk or chief or senior magistrate.¹ Resignations may be made, and are in practice made, either by a written intimation of an intention to resign on a day not less than three weeks distant, followed on the expiry of the specified time by a resignation *de presenti*, or by a written resignation *de presenti*, which, however, can only be regarded as a resignation to take effect without farther procedure twenty-one days after its date. Till the expiry of the twenty-one days fixed by the statute, or of such more postponed time as the intimation of resignation may specify, the person resigning or intimating his intention to resign holds his office, and must be regarded as a councillor, magistrate, or office-bearer. All such resignations should be clear and explicit, and not made dependent on any contingency—such as the election of the person resigning to an office. As at present advised, the writer would not regard a resignation made dependent upon such a future event, or take any action on it.

170. An intimation of an intention to resign, or a resignation *de presenti* which can only be regarded as equi-

¹ See section 26 of the Act 3 and 4 Will. IV., cap. 76, and section 24 of the Act 3 and 4 Will. IV., cap. 77.

valent to such intimation, may, however, as it appears to the writer, be withdrawn by the person who has tendered it, at any time within the twenty-one days prescribed by the statute, or such longer period as the letter of intimation or resignation may have fixed. The competency of withdrawing a resignation thus made *de presenti* having been questioned in Edinburgh in May 1870, the writer advised the town council to the effect above expressed, and his opinion was acted upon. But in December 1872, the question was again raised under circumstances which rendered it expedient to consult counsel, when the following opinion was obtained from the then Solicitor-General, Mr. A. R. Clark:—"I am of opinion that it is competent to recall the resignation within the three weeks. By the 26th section of the Act of 1833, no councillor can resign his office without giving three weeks' notice; consequently, a resignation, though absolute in form, is no more than an intimation of an intention to resign; and while the three weeks are current, it is, I think, competent for the councillor to recall the intimation given by him, and to retain his office."

171. If in the course of the municipal year a vacancy occurs in the council, or magistracy, or office-bearers of the burgh, by reason of resignation, death, or disability, the remaining members of the council are required to fill up the same *ad interim* by election, to be made by plurality of voices, the chief or senior attending magistrate having a double or casting vote in case of equality.¹ In 1872, the then Solicitor-General, Mr. A. R. Clark, and Mr. Watson were consulted as to whether the provisions of the Ballot Act affected such elections *ad interim*, or whether these elections must still continue to be conducted under the old law, and they were of opinion "that the provisions of the Ballot Act

¹ See the Acts 3 and 4 Will. IV., cap. 76, section 25; and 3 and 4 Will. IV., cap. 77, section 23.

have exclusive application to cases where the right of election belongs to the qualified electors of the burgh; and that *interim* elections by the council must continue to be conducted under the old law.”¹ Such election must be made at a meeting to be called on five days’ notice by the town clerk, by intimation in writing to each of the remaining members of council.² In practice the council usually fixes the day on which the election is to take place, and the town clerk gives the notices required by the statute five days before the day on which the election has been fixed to take place.³ This rule applies to all vacancies occurring during the municipal year—those in the office of provost or treasurer equally with those in the office of bailie or councillor. The person so elected *ad interim* holds office only till the first Tuesday of November immediately following his election; and the vacancy occasioned by his retirement at that time must be supplied at the next annual election of councillors and magistrates or office-bearers. If the vacancy occurs in the office of councillor of any burgh

¹ See Memorial and Opinion, Appendix xv. pp. [162], [163], [184].

² *Provost of Dumbarton and others v. Denny and others*, 6th December 1796; 3 Pat. App. 516. On the day following the death of one of their number, a town council, meeting for usual business, proceeded to elect a new councillor. A minority objected. The election was held void, fourteen days’ notice to each councillor being required previous to such election. In deciding this case, the Lord Chancellor (Loughborough) observed:—“A number of cases were cited by the appellants in the Court to show that election of officers of the burgh had taken place at meetings of the councillors without previous notice. But the nature of the thing renders intimation absolutely necessary; and no practice, however inaccurate, or for whatever length of time, can establish a contrary rule. It is true that if the councillors assembled in general meetings are unanimous in concurring upon any measure competent to such general meetings, and if all the members acquiesce, it may be in their power to proceed to matters of which no previous intimation was given. But if the members are not unanimous, it will be necessary for a new meeting to be called, with proper intimation of the measure intended.”

³ In 1835 the Commissioners on Municipal Corporations in Scotland reported as follows:—“Town clerks are bound by the statute to call meetings for the purpose of filling up vacancies in the council occurring during the year. But it should further be ordained, that every town clerk shall issue notice of election within forty-eight hours after a vacancy comes to his knowledge, the council being prohibited from transacting business till the vacancy be filled up.”—General Report, p. 97.

which has been divided into wards, then such vacancy must be supplied at the annual election of councillors by the electors of the ward for which the councillor who has resigned, died, or become disabled, was elected, and such electors must in that case elect a councillor in addition to the third which falls to retire at that time, unless the person who has resigned, died, or become disabled, would have gone out of office as one of such third.

172. The 24th section of the act 3 and 4 William IV., cap. 76, and the 22d section of the act 3 and 4 Will. IV., cap. 77, provide that "when any magistrate or office-bearer (other than the provost or chief magistrate and treasurer) shall be in the third of the council going out of office, the place of such magistrate or office-bearer shall be supplied by *election by the council* as soon as the full number thereof shall have been completed by the annual election of the third;" while the 25th section of the former act, and the 23d section of the latter act, enact that vacancies in the council or magistracy or office-bearers, occurring in the course of the year, "shall be filled up *ad interim* by the *remaining members of the council* by election as hereinbefore provided, at a meeting to be called on five days' notice by the town clerk, by intimation in writing to each of such remaining members of council." It has been maintained that *interim* elections under the two sections last referred to are not vested in the council as a corporate body, but in the remaining members of council as a class of individuals; that by these sections the members of council individually are made quasi-electors in room of the electors of the ward; and that election by such councillors as choose or find it convenient to attend, without reference to quorum, is as valid as an election on other occasions by a small and inconsiderable number of the constituency. In other words, it has been maintained that the power to elect *ad interim* being given to the remaining members of council, while the power to elect ordinary magistrates is given to the council when complete, the

former is a personal right exercisable by those who attend, while the latter is a corporate act, and requires a majority. This construction of the 25th section of 3 and 4 Will. IV., cap. 76, was adopted by Lord Cunninghame (Ordinary) in the case of *Fraser v. Rose*;¹ and in a note to his interlocutor, refusing the Bill of Suspension, his Lordship said—“There are strong reasons for this construction in many different cases of vacancy that may occur in town councils.” The question thus raised does not appear, however, to have been finally decided, and, in the absence of an authoritative decision to the contrary, the writer would hesitate to proceed with an election *ad interim* unless a majority of the council were present.

173. In the same case of *Fraser v. Rose*, it was maintained that, even if elections *ad interim* were corporate acts, still, in cases in which the want of a quorum is created by an illegal concert or combination among the members, the election by a minority is valid. This contention was supported by the Lord Ordinary (Cunninghame) who, in the note to his interlocutor, said, “This was laid down in one branch of the *Culross* case, in 1809 or 1810 (the papers in which the Lord Ordinary has not had time to seek out or refer to), and in the later case of *Kirkcaldy*, about twelve or fifteen years ago, when the relevancy was discussed, though the case was given up before the proof was concluded.”² The point thus raised does not appear, however, to have been finally decided.

It has also been questioned, (1.) Whether, when a meeting has been regularly called for the purpose of filling up a vacancy in the council or in the magistracy or office-bearers, the council, or the remaining members of council present at the meeting, are bound to proceed with the election, or may competently adjourn it? and (2.) Whether, in the event of a majority of the council, or

¹ *Fraser v. Rose*, 6th July 1837, 15 S. 1250.

But see opinion of Mr. Watson and Mr. Balfour, quoted in the footnote to No. 173 of these Observations, p. 292.

² See also No. 154 of these Observations.

of the remaining members of council, failing or refusing to elect at such a meeting, a minority may nevertheless do so? It appears to the writer that while the statutes appoint such vacancies to be filled up at a meeting called on five days' notice, the time specified in the notice cannot be regarded as a statutory period of election, to the effect that if the election be not then completed, it cannot be made on any other day. The course which, as at present advised, he would therefore follow in a case in which a meeting had been duly called to fill up a vacancy *ad interim*, but a majority of the Council, or of the remaining members of Council, failed to attend, while the minority insisted on the election being proceeded with, would be to advise the provost or preses to decline to proceed with the election, on the ground that a majority of the council not being present, procedure was incompetent. If so required, however, the writer would minute the whole proceedings, so as to preserve a record with which the Court might deal in any proceedings that might be afterwards instituted to determine the rights of parties. Where a majority of the council attended, but resolved to adjourn the election, while a minority insisted on its being proceeded with, in terms of the previous resolution of the council and the statutory intimation by the clerk, he would advise the provost or preses to give effect to the decision of the majority; but he would, if so required by the minority, minute the whole proceedings, so as to preserve a record of the *res gestæ*. Where all parties acquiesced in an adjournment, and fixed another day for the election, he would give effect to that resolution.¹

¹ See the case of *Gibson and Others v. Kerr and Others*, 20th December 1856; 19 D. 261; 29 Jurist 111, referred to in footnote 1 to No. 139 of these Observations, p. 240.

In an opinion obtained from Mr. Watson and Mr. Balfour, in March 1876, as to the course which should be adopted when a majority of the members of a town council absented themselves from meetings, these counsel said:—It does not appear to us that any means exist by which the majority of the councillors can be compelled to attend, and if they do not attend, we fear the council must practically remain in abeyance

174. It is the practice of the councils of some burghs, in electing councillors *ad interim*, to give effect to the recommendation of the electors of the burgh, or of the ward of the burgh, in the representation of which the vacancy has occurred. This recommendation is sometimes expressed by a memorial; and when memorials in favour of different persons are submitted, the preference is determined by the relative numbers of signatures attached to the respective memorials, if there be no reason to doubt that the signatures are those of *bona fide* electors in the burgh or ward in which the vacancy has occurred. On rare occasions the claims of competing candidates for election *ad interim* have been decided by a poll taken by the remaining councillors of the burgh or ward at their own cost. But this practice can scarcely be said to be in accordance with the spirit of the Ballot Act, and is not likely to be resorted to now.

175. When a magistrate or office-bearer retires from the council during the currency of a year, a double vacancy is occasioned, which must be supplied by the council electing *ad interim*, first a councillor, and afterwards, when the council is completed, a magistrate or office-bearer. Both elections may take place in immediate succession.

176. When a vacancy in the magistracy or office-bearers is occasioned by the resignation of the holder, who still remains in office as a councillor, the double

until the next election,—a thing which, although now comparatively rare, was not unfrequent prior to the passing of the statutes referred to in the memorial. [3 and 4 Will. IV., cap. 76; 16 Victoria, cap. 26; and the Municipal Elections Amendment (Scotland) Act, 1868, 31 and 32 Vict., cap. 108.] In the case of *Fraser v. Rose*, 6 July 1837, 15 S. 1250, a question arose whether, in the event of a combination existing among some members of the council to absent themselves for the purpose of defeating the election, it became competent to the minority to elect, but, notwithstanding some *dicta* by Lord Cunningham favourable to the power of the minority in the matter, we consider the rule to be well settled that municipal business cannot be transacted without a majority of the full council, or what is the same thing, when the council consists of an even number by the votes of half the number, and the casting vote of the provost.

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election is of course unnecessary ; but the meeting for supplying the vacancy must still be held after the resignation has taken effect, and must be called on five days' notice.

177. Differences of opinion exist as to what constitutes "disability" of a magistrate, or office-bearer, or councillor in the sense of the statutes. When a member of council loses the qualification without which he could not have been eligible for election, or, in virtue of which alone he remains in the council, must he be held to be "disabled"? In other words, is disability to be regarded as equivalent to disqualification, as is maintained by some ; or must it involve physical or mental incapacity to perform the duties of the office, as is held by others? Upon this subject reference may be made to what has been already stated in No. 166 of these Observations. Eminent counsel have supported each of these views, and no decision has been given on the subject.¹ It has always appeared to the writer that the continued possession of the qualification which the legislature has prescribed as an essential

¹ The question was raised in Arbroath in 1870 under the following circumstances :—A. was elected a councillor in November 1869. At Whitsunday 1870 he removed from the burgh, and lost his qualification as an elector. Mr. A. R. Clark was thereupon consulted as to whether such loss of qualification did not constitute disability, and create a vacancy in the council which would have to be filled up at the annual election of councillors in November 1870. He returned the following opinion on 18th October 1870 :—"I am of opinion that [A.] is disqualified, and that another councillor ought to be elected in his place. No one can be elected a councillor unless he possesses the qualifications specified in the eighth section ; and, in my opinion, it is implied that he retains these qualifications in order to enable him to retain the office."

The same question was again raised in Forfar in 1873, under the following circumstances :—B. was elected a councillor in November 1872. Having failed to pay his poor-rates on or before 20th June 1873, as required by section 3 of The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict., cap. 48), he lost his qualification as an elector, and his name did not appear in the parliamentary or municipal register for 1873-4. On that occasion counsel advised that the disqualification above explained did not constitute disability in the sense of the statute. Subsequently, the writer brought the question again under the consideration of Mr. Clark in consultation ; and he adhered to the opinion given by him to Arbroath in 1870, as being most consistent with the spirit of the Act.

condition of election is necessary, and that the loss of this qualification "disables" the loser, and disqualifies him from continuing in the council.¹ Reference has already

¹ On this subject the decisions of the English Courts with reference to questions raised under the 36th section of 5 and 6 Will. IV., cap. 76, are instructive. That section enacts that if the mayor of any burgh shall, at the time when it may be necessary to execute the powers and duties provided by the act with respect to elections, "be dead, absent, or otherwise *incapable of acting*," the council shall appoint one of the aldermen to execute all such powers and duties in place of the mayor. It was contended that the words "dead, absent, or incapable of acting," could only be construed as meaning some incapacity of acting analogous to death or absence, which are physical objections, and not mere legal objections arising from the situation of the mayor rendering him incapable of acting. It was held, however, in *The Queen v. Owens*. [Ellis, and Ellis, *Queen's Bench Reports*, vol. ii. p. 86; 28 L. J. (Q. B., 316); and *The Queen v. White* [L. R. 2 Q. B. 557], that the words of section 36 are not to be confined to incapacity of a physical character, but should be construed so as to include legal incapacity. On the same principle, it appears to the writer that the word "disability" should be construed as meaning legal disability or disqualification.

In the case of *Miller v. Jervis*, 20th June 1840; 2 D., 1181, the Court held that the insolvency of a manager of a royal burgh rendered it inexpedient to continue him in the management, and another was appointed to take his place.

In November 1877 the writer consulted the Lord Advocate (Watson) and Mr. J. Badenach Nicolson on this point. The query put to them was as follows:—Does disability in the sense of the Act 3 and 4 Will. IV., cap. 76, mean the loss of the qualification for being a councillor or magistrate prescribed by the Act, or does it mean physical or mental incapacity to perform the duties of the office? To that query the following answer was returned:—"The question raised in this query is one of much difficulty. The general rule is that, where a particular qualification is necessary in order to the acquisition of a public franchise or election to a public office, the continuance of the qualification is essential to the retention of the franchise or the office. The rule is subject to exceptions, but these must be matter of express enactment or plain implication. A well-known exception in regard to a franchise has already been referred to, as enacted by 31 and 32 Vict., c. 108, sec. 8, which provides that in municipal elections the register is conclusive evidence that the persons therein named continue to have the qualifications annexed to their names. In regard to the retention of a municipal office, eligibility for which depends on the same qualification as the municipal franchise, we are of opinion that if the qualification for the franchise is lost the office cannot be retained, and we are inclined to think that the right to the franchise and the right to retain office would be held to fall together. In other words, if a town councillor or magistrate elected for three years were to have his name struck off the municipal register at any time within that period, we are of opinion that his office would be vacated, and the council should proceed to fill the vacancy. But so long as the office-holder's name remains on the register we could not advise that he would vacate his office, although notoriously

been made to the effect of the loss by a councillor of burgess-ship acquired under the provisions of, "The Burgess (Scotland) Act" (39 Victoria, cap. 12).¹

178. When a vacancy in the council occurs during the course of the year, by the death, resignation, or disability of A., and is supplied by the election of B. *ad interim*, B. or C., who is elected at the next annual election of councillors to fill the place of B., who must then retire, does not take the place of A., to the effect of going out of the council at the time when A., if he had not died, resigned,

he had ceased to possess the character in respect of which his name was inserted in it.

"The foregoing observations in this answer relate chiefly to what may be termed *loss of qualification*. It is necessary to add as regards *disqualifications*, where they depend on express *statutory enactment*, *e.g.*, if a councillor or magistrate were appointed to a disqualifying office [see opinion quoted in footnote 2^c, p. 23. Additions and Corrections, No. (14)], or were to be convicted of bribery [see opinion quoted in footnote 3, p. 48, Additions and Corrections, No. (30)], the disqualification would take effect immediately, and the vacancy ought to be filled up at once. Where, on the other hand, the disqualifications are *legal* merely, *e.g.*, if a councillor or magistrate were to become insane, we think the safer course would be to wait till the question of his incapacity were decided in the course of making up the register.

"We have only to add that in making this answer we have had fully before us the difficulty occasioned by the use of the term 'disability.' It is no doubt a term less comprehensive and elastic than 'disqualification;' but we are not prepared to limit it in construing the 25th sec. of 3 and 4 Will. IV., c. 76, to incapacity of a mental or physical nature. We think it may fairly be read in that section as including 'loss of the elective qualification and any other legal disqualification as a voter.'"

¹ See No. 123 of these Observations, p. 207.

In the case referred to in note 3, pp. 238-9, a councillor of Edinburgh was discovered not to be on the roll of electors, and he resigned. The council, however, immediately declared the seat of the person so found to be disqualified to be vacant, and resolved to fill it up on a day fixed. The then Lord Advocate (afterwards Lord Rutherford) was consulted as to the legality of the course adopted, and also as to the propriety of the council declaring the vacancy still more distinctly when they proceeded to fill up the vacancy. The terms of the proposed declaration were as follow:—Thereafter, the council having taken into consideration the intimation of [A.] of his *disability* for the office of councillor, and its verification by the clerk as custodier of the register of voters, they declare the seat in the council which he held vacant by disability, and resolve, etc. The Lord Advocate replied, "I think the council have adopted the proper steps for electing a councillor in room of [A.], and I approve of the preamble proposed to the minute of election."

or become disabled, would have fallen to retire. B. or C.'s place in the roll will be under that of the councillors previously elected for the burgh, or for the ward if the burgh is divided into wards; and his position, relatively to other councillors elected for the burgh or ward at the same election, will be determined in the way explained in No. 144 of these Observations.¹

179. In the event of any councillor, magistrate, or office-bearer intimating his resignation of the office of councillor "as to be made at the period of the annual retirement of one-third of the council," such additional number of councillors must then be elected as may be necessary to complete the council.² These resignations must be intimated three weeks before the day appointed for the

¹ *Scott and Others v. The Magistrates of Edinburgh*, 21st December 1838. In this case, the town clerks of Edinburgh having included in their list of the councillors to retire by rotation at an annual election one who had been only a year in office, on the assumption of his being to be considered a substitute to serve out the unexpired time of a councillor resigning, and no objection or protest having been taken till the first meeting of the new council, when his vote was refused,—it was held 1. That the councillor and his constituents were not barred from asserting his right; and 2. That the third of the councillors of a burgh going out of office annually by rotation, under the provisions of 3 and 4 Will. IV., cap. 76, must always consist of those who have been longest in office, and that when councillors resign before the expiry of their period of service, and others are elected in their place, the latter are not to be regarded as substitutes for those resigning, but as original councillors entitled to hold their office till the expiration of the full statutory period. [1 Dunlop, 347; 14 F. 622; 11 Jurist, 239.]

See also the *dictum* of the Lord President (Inglis) in *Thomson v. The Magistrates of Rutherglen*, 17th February 1876. "It is impossible to arrange so that every councillor shall have three years of office, neither more nor less. Then, if you have more than one-third who have been three years in office, you must select who is to go out and who to remain. One way in which the difficulty might be avoided is this, namely, to hold that, when any councillor dies or retires during the currency of his term of office, the person elected in his stead only comes in to serve out his period of office. If that were acted upon it would obviate any difficulty. But that view has been authoritatively negatived in the case of *Scott v. The Magistrates of Edinburgh*, and that decision has been acted on ever since, and it is impossible to go back upon it. [The Scottish Law Reporter, vol. xiii., p. 298; Court of Session Cases (Fourth Series), vol. iii., p. 458.]

² See section 26 of the Act 3 and 4 Will. IV., cap. 76; and section 24 of the Act 3 and 4 Will. IV., cap. 77.

annual election of councillors. But, as the councillor, magistrate or office-bearer by whom such resignation is tendered may recal the intimation during the currency of the three weeks, and so supersede and render nugatory any proceedings which may have been taken to supply the anticipated vacancy, the question arises—what steps should be taken in such circumstances? The town-clerk must, ten days before the day of election, give public intimation of the place or places at which the several elections are to be conducted, and should also state what vacancies have to be supplied as far as these are then known.¹ There seems to be no alternative in such a case but to proceed on the assumption that the intimated resignation will take effect, and that the vacancy thereby occasioned will be supplied by election, on the first Tuesday of November, if the resignation be not withdrawn. As regards the nomination of candidates, assuming that one councillor falls to retire in the ordinary course, and that another, who does not fall to retire at that time, has intimated his resignation as to take effect at the period of the annual retirement of one-third of the council, two persons must be nominated to supply the vacancies so occasioned. If more than two persons are nominated, a poll must of course take place, and no difficulty can arise. But, if only two persons are nominated, and the resignation is withdrawn, let it be supposed on the Friday or Saturday immediately preceding the day of election, and after the town-clerk has intimated, in terms of the Municipal Elections Amendment (Scotland) Act, 1868, and in reliance on the resignation receiving effect, that no poll will take place, what is to be the result? Obviously a new election under the provisions of section 9 of the Election Act of 1868.

It has been suggested that this difficulty might be obviated, if the one nomination paper bore that the person nominated was proposed for election in room of the coun-

¹ See No. 34 of these Observations.

cillor who retired by rotation, and the other that the person nominated was proposed in room of the councillor who had intimated his intention to resign, and to supply the vacancy which such resignation would occasion. In that case, the public intimation by the town-clerk, under the Election Act of 1868, might, it has been suggested, set forth the above facts, and the presiding magistrate might, at the proper time, declare the person proposed for election in room of the councillor who retired by rotation to be duly elected, holding the other nomination to be superseded by the withdrawal of the resignation. If this mode of obviating the difficulty suggested were not resorted to—and the writer has great doubt as to its competency—no modification, by the town-clerk, of the statutory intimation which he is required to give by the Election Act of 1870, would seem to be sufficient—for the electors should, on or before the Friday preceding the day of election, know absolutely whether or not there is to be a poll. Yet the person who had tendered his resignation might not withdraw it till the day immediately preceding the election, and in that case, moreover, it would be impossible to complete the arrangements for taking a poll to elect one of the two persons who had been nominated without qualification or explanation. It appears to the writer that the most prudent course in such circumstances would be to proceed in all respects as if the resignation were to take effect, to let the nominations and statutory intimations be made in strict accordance with the Election Acts of 1868 and 1870, and then, if the withdrawal of the resignation created embarrassment, to hold that no election had been made, and to proceed as in the case of a double return, or of a person elected declining to accept office as a councillor.¹

¹ Upon the points of difficulty, above indicated, the writer in 1872 obtained the opinion of Mr. A. R. Clark, then Solicitor-General, to the following effect:—

“ If the resignation is intimated three weeks before the first Tuesday

2. In Town Councils of Burghs of Regality and Barony, not being Parliamentary Burghs.

180. In burghs of regality and barony, not being parliamentary burghs, the mode of supplying such vacancies as may occur during the course of the municipal year in the magistrates, or office-bearers, or council, is regulated by the charter or act of parliament by which the burgh has been erected, or under which its affairs are administered. When the charter or act of parliament contains no provision on the subject, the procedure is regulated by the set of the burgh or by established usage.

3. In Police Commissions of Burghs and Places subject to the General Police Act of 1850 or 1862.

181. The Act of 1850 gives no express power to commissioners or magistrates of police to resign, but section 36 assumes the existence of the power in enacting that in case the place of any of the commissioners or magistrates becomes vacant *inter alia* by *resignation*, it shall be lawful for the remaining commissioners and magistrates to nominate persons duly qualified to supply such vacan-

of November, so that it may take effect on or before that day, I think that the town-clerk would be justified in acting on it, and issuing notices for the election of a new councillor to supply the vacancy expected to arise through the resignation. Indeed, I think that there is no choice in the matter. For the act provides, that when the resignation is 'intimated as to be made at the period of annual retirement of one-third of the council,' the additional councillors shall be elected by the constituency. It is therefore necessary that the notices should be in such a form as to give the constituency an opportunity of electing, even though some inconvenience might occasionally arise by the withdrawal of the resignation. It would, however, be proper to make the notices bear that the vacancy was conditional on the resignation not being withdrawn.

"A question might arise as to the nomination. It may be avoided by making them conditional. But, at the worst, it would only lead to a poll, if the nominations were in excess of the vacancies, and I think that it would be safer to run this risk than to prevent an election by the constituency."

cies. In the absence of prescribed conditions, resignation under this act may, it is thought, be made at such time as the resigner chooses, and either with or without intimation; but, to prevent public inconvenience, it would be well that in every case he should give reasonable notice of his intention to resign. It must be observed, however, that the provision in section 34, that outgoing commissioners may be re-elected, applies only to commissioners who form part of the third which has to retire annually.

The Act of 1862 enacts that any magistrate of police or commissioner may resign his office at any time on giving three weeks' notice, in writing, to the clerk, of his intention to do so; and it is in connection with this provision that it is declared that any out-going commissioner may be re-elected.¹ After the office has become vacant, the remaining commissioners are empowered to nominate a person duly qualified² to supply the vacancy.

The power conferred by the Act of 1850 on "the remaining commissioners and magistrates of police," and by the Act of 1862 on "the remaining commissioners," to nominate persons duly qualified to supply vacancies occurring during the year, may be exercised by the commissioners and magistrates, or commissioners who remain in office, though they fall short of the number required by the statute to constitute a quorum. Such nominations are not corporate acts, and do not require to be made at meetings of the commissioners. They may be made without any formal meeting, provided they are made distinctly. The power of supplying vacancies must be exercised to the extent of having a body of commissioners sufficient to carry out the purposes of the statute, but beyond this it is not indispensable that vacancies should be supplied.³

¹ See section 53 of the General Police Act of 1862.

² See No. 133, sub-section (2) of these Observations.

³ *Sime v. Coghill, &c.*, 15th November 1877. 15 Scot. Law Rep., p. 92. [Court of Session Cases (Fourth Series), vol. v. p. 132.]

The person nominated to supply a vacancy has the same powers and privileges under the Act of 1850 or 1862 as the person in whose stead he is nominated, and remains in office until the next period of election, when he goes out of office, and the vacancy is supplied by the householders of the burgh, or, if the burgh is divided into wards, by the householders of the ward in which the vacancy has occurred.¹ When a resignation is intimated so as to take effect at the period of the annual election of commissioners, the Act of 1862² provides that the vacancy so caused shall be supplied by the householders of the burgh, or, if the burgh is divided into wards, by the householders of the ward in which the vacancy shall have occurred, by election at the period of annual election.³ The Act of 1850 contains no corresponding provision; but it appears to the writer that the course prescribed by the Act of 1862 should be followed in burghs and places subject to the Act of 1850, in so far as regards the supply of vacancies occasioned by the retirement of commissioners whose resignations are intimated so as to take effect at the period of the annual election of commissioners.

On this subject reference may be made to Nos. 169 and 170 of these Observations.

As to what constitutes disqualification of a magistrate of police or commissioner, see No. 177 of these Observations.

¹ See section 36 of the General Police Act of 1850, and section 55 of the General Police Act of 1862.

² See section 55.

³ See footnote 1 to No. 168 of these Observations, p. 283.

XI.—CIRCUMSTANCES WHICH INTERFERE WITH THE TRIENNIAL RETIREMENT OF COUNCILLORS AND COMMISSIONERS OF POLICE, AND RULES FOR DETERMINING WHO ARE TO BE INCLUDED IN THE THIRD WHO FALL TO RETIRE IN EACH YEAR.

1. Of Councillors in Royal and Parliamentary Burghs.

182. It has already been stated, that, under the provisions of the Acts 3 and 4 Will. IV., cap. 76, section 16, and 3 and 4 Will. IV., cap. 77, section 12, one-third, or a number as near as may be to one-third, of the whole council of every Royal and Parliamentary Burgh, must go out of office on the first Tuesday of November in each year,—the third who fall to retire consisting of the councillors who have been longest in office.¹ In ordinary course, therefore, every councillor remains in the council for three years. But his tenure of office as a councillor may be shortened by a variety of circumstances, of which the following illustrations may be given, in each of which the provisions of the several acts, as above explained, are applied.

183. When a councillor is elected provost, or chief magistrate, or treasurer, of a burgh, otherwise than *ad interim*, to supply a vacancy occurring during the year, he retains office for a period of three municipal years from the date of his election as provost or chief magistrate or treasurer.² Such election, if it immediately succeed his election as a councillor, makes no change on the ordinary rule of rotation. His tenure of office as councillor is of equal duration with his tenure of office as provost or chief

¹ See No. 23 of these Observations.

² See No. 162 of these Observations.

magistrate or treasurer. He holds both for three years, —*i.e.*, till the first Tuesday of November in the third year. But if his election to either of the higher offices takes place at any annual election after the first immediately succeeding his election as councillor, his connection with the council is extended for a period corresponding to that which may have intervened between his election as a councillor and his election to the higher office. Thus, if he be elected provost or treasurer after he has served two years as a councillor, his official existence is prolonged for two years, and his remaining in the council necessitates the going out in each of two successive years of a councillor for the burgh or ward, as the case may be, who would otherwise have been entitled to remain a year longer in the council.

184. The death or resignation of a councillor during his second year of office produces a similar result. Thus, suppose A., B., and C. to be councillors for a burgh or for a ward of a burgh,—A. being in his third, B. in his second, and C. in his first year of office. In the ordinary course, C. will serve out the year current and two entire years thereafter. But B. dies. The vacancy occasioned by that event is supplied by the council electing D. *ad interim*. On the first Tuesday of November following, A. and D. go out of office,—the one having served three years, and the election of the other being merely *ad interim*. They are both re-elected, and take their places on the roll below C., who has to retire on the first Tuesday of November following,—a year earlier than he would have done but for B.'s death.

185. The death or resignation of a councillor during his first year of office necessitates the retirement of one councillor after holding office for only two years. Thus, suppose A., B., and C. to be councillors as above explained. C. dies or resigns, and D. is elected councillor *ad interim*. At the first annual election thereafter (say in 1874) A. retires, having completed three years of office, and D.

retires as a councillor *ad interim*. E. and F. are elected to supply these vacancies, and it is arranged that E. shall retire before F. B. goes out of office at the second annual election (in 1875), having completed three years of office, and is succeeded by G.; and at the third annual election in 1876, E., though he has been in office only two years must retire as one of the third. E.'s tenure of office would be still more reduced if, at the first annual election of magistrates and office-bearers in 1874, B. were elected provost or treasurer. In that case, B. would remain in the council till 1877, E. would retire in 1875, having served only one year, and F. in 1876, having served only two years.

186. The death or resignation of a councillor, say A., during the last year of his term of office, makes no difference in the tenure of office of the councillors who have not held office so long as he has done. A.'s place must of course be supplied by an election *ad interim*, and the *interim* councillor must retire at the next annual election of councillors, but such *interim* councillor only takes the place which A. would have taken had he not died or resigned.

187. On this subject, the decision of the First Division of the Court of Session in the case of Thomson, &c., v. The Magistrates of Rutherglen,¹ confirms the practice of the

¹ 17th February 1876. The Scottish Law Reporter, vol. xiii., pp. 293-299; Session Cases (Fourth Series), vol. iii., pp. 451-460.

The opinion of the Lord President (Inglis) in that case, concurred in by Lords Deas, Ardmillan, and Mure, narrates the facts, and explains the grounds of the judgment as follows:—"The object of this action is to set aside the proceedings at the election of councillors for the burgh of Rutherglen in November 1875, and the election of Mr. Robert Hamilton as a bailie of the burgh following upon that election of councillors, and to have it declared that Mr. Hamilton was not lawfully elected a bailie, and that, prior to the date of his pretended election as bailie, he had ceased to be one of the councillors of the burgh.

"The whole question turns on the regularity of the election of councillors in November 1875. There has been a good deal of reference back to the proceedings at the election of 1874, but it appears to me that we have nothing to do with them in dealing with the case.

larger burghs as above explained, and settles the law in regard to several points on which some diversity of opinion previously existed.

"The burgh of Rutherglen had by the set of the burgh eighteen councillors, and this number was not altered but confirmed by the Act 3 and 4 Will. IV., c. 76. After providing for the first election of councillors, which was to take place in 1833, the statute enacts, that a certain portion of the councillors shall go out of office in each subsequent year, and their place be filled by election. It provides specially in section 16 for the first two years after the Act came into force, viz., 1834 and 1835, and then it provides generally that in every succeeding year one-third, or a number as near as may be to one-third, of the whole council shall go out of office. Now, the number of councillors in this particular burgh being eighteen, the practical application of this rule in the present case is that six councillors go out yearly, and six new ones are elected in their place. Accordingly, we find that in the three years 1871, 1872, and 1873 that course was precisely followed—six councillors went out and six were elected. But in 1874, when the time for the election came round, it turned out that, in the interval between that and the previous election, a gentleman had been elected provost who would have been one of the six to go out in November 1874. Now, the 24th section of the statute provides that the provost shall always remain in office for the period of three years, and that has been construed by universal practice, and very reasonably so, to mean that the provost is to have three years tenure of office after his appointment to that particular office, irrespective of the date at which he was elected to the council and of the date at which he should have gone out of the council. Consequently, Mr. Scouler, the gentleman who was elected provost in November 1873, must remain in the council till November 1876. He had been elected to the council in November 1871, and therefore, in the ordinary course of events, he would have been one of the six councillors who fell to go out in November 1874, but, having been elected provost he remained in, and, instead of six, only five councillors went out in November 1874. It was contended for the pursuers that another councillor ought to have gone out in his place. On the other hand, it was maintained for the defenders that the effect of the clause was simply this, that when the period arrived at which the provost ought to have gone out, one fewer than the usual number of councillors fell to go out, and one fewer to be elected.

"This question was pressed upon our attention in the argument as being at the root of the irregularities alleged, but I really do not think that it is necessary to determine it, for whether the pursuers are right or wrong in their contention on this point, and whether the election of 1874 was regular and valid, or irregular and invalid, does not affect the validity of the election of 1875.

"In 1874, as matter of fact, the defenders' construction of the statute was adopted, and five of the council went out instead of six. I give no opinion on the validity of the consequent election, but, for the purpose of deciding the case before us, I assume that the election of 1874 was in regular course. Now, in November 1875, the councillors who would naturally fall to go out were those elected in 1872, and if there had been six elected in 1872 still in the council, no difficulty

2. Of Councillors in Burghs of Regality and Barony, not being Parliamentary Burghs.

188. In burghs of regality and barony not being parliamentary burghs, the periodical retirement of the

would have arisen. But that was not the fact. The state of the facts was this, that of six who had been elected in 1872, one, a Mr. Wallace, had died in 1874, and before November of that year, and another, Mr. Davidson, had died in 1875, and before November of that year. Now, it appears to me that, according to the true construction of the statute, the gentleman who died in 1875 fell to be counted as one of the councillors going out of office in that year, just as if he had survived until November; but, on the other hand, that the gentleman who died in 1874 cannot be counted as one of those going out in November 1875, though his three years of office would have expired then if he had survived. I can find nothing to the contrary in the statute. For when he died in 1874 his place fell to be filled up, and was filled up, in November 1874, in addition to those of the five retiring councillors; and therefore it is impossible that he can be counted as one of those going out in 1875. His place was already filled up by a councillor, who was entitled to retain office until 1877.

“The view which the Lord Ordinary has taken as to the election of 1875 is perfectly logical, and his reasoning would be irresistible, but unfortunately he has proceeded upon an error in fact, which vitiates his judgment, in not distinguishing between these two death vacancies. He takes them as both occurring in 1875, and draws his legal conclusion accordingly.

“Now, this brings the matter to a very simple issue. Was it necessary or was it not, that six councillors should go out in November 1875, or was the statute satisfied with only five? To determine this question it is necessary to give particular consideration to the 16th clause which provides for the retirement of councillors. It says,—‘That upon the first Tuesday in November 1834, and in every succeeding year, one-third, or a number as near as may be to one-third, of the whole council’ shall go out of office; and it is contended for the defenders that the meaning of these words, ‘a number as near as may be to one-third,’ is, that if there are not as many as one-third of the council who have been three years in office, you must take as nearly one-third as there are councillors who have been three years in office. Now, I cannot adopt that construction. No doubt the normal condition of the council, as contended for by the defenders, is this, that every member should have three years of office, and no member more than three years of office. But it is quite impossible in practice that that position of affairs should be maintained. It may happen that of those elected, say in 1872, not one remains in office in 1875, and yet the statute provides that one-third of the council shall go out in each year. According to the defenders’ contention there would be no one to go out then at all. That, certainly, cannot be the true construction of the statute, for it would leave the council unchanged for a whole year. But without going the length of supposing that all those elected in any one year have disappeared before their three years have elapsed, we may at least suppose that some two or three of them have done so. There would then remain only

magistrates and councillors, and the rules for determining who are the persons to retire in each year, are prescribed by the charter or act of parliament by which

three or four to go out. Now, could three or four out of six be brought under the terms of the statute as 'one-third, or a number as near as may be to one-third?' Moreover, it is just as clear that you will have, at some subsequent election, a much larger number than one-third who have been three years in office. For if at one election, you have only two or three to go out you will find a corresponding surplus in some following year; and so, instead of one-third to go out, you will have three or four more than one-third who would, according to the theory of the defenders, all have to go out at once. Therefore it is, I think, plain that this theory of the normal condition of the council cannot be perfectly carried out. It is impossible to arrange so that every councillor shall have three years of office, neither more nor less. Then, if you have more than one-third who have been three years in office, you must select who is to go out and who to remain. One way in which the difficulty might be avoided is this, namely, to hold that, when any councillor dies or retires during the currency of his term of office, the person elected in his stead only comes in to serve out his period of office. If that were acted upon it would obviate any difficulty. But that view has been authoritatively negatived in the case of *Scott v. The Magistrates of Edinburgh* (Dec. 21, 1838, 1 D. 347, 11 Scot. Jur., 239), and that decision has been acted on ever since, and it is impossible to go back upon it. It seems to me, therefore, that when the statute talks of one-third, or as near as may be to one-third, what it means is this, one-third, or as near to one-third as the number of councillors fixed by the set of the burgh permits. If the number is, as here, divisible by three, there is no alternative but that one-third must go out each year.

"That being so, the proceedings at the election of councillors in November 1875 was plainly irregular. Only five went out, including Mr. Davidson, who died in that year. It is true six new councillors were made, but one was elected to supply a vacancy caused by the resignation, in the course of the year 1875, of Mr. Alexander, a councillor who had not been elected in 1872, and whose place, therefore, required to be supplied in terms of the 25th section of the Act 3 and 4 Will. IV., c. 76, over and above those of the one-third retiring in ordinary rotation. The proceedings at the election of November 1875 were therefore irregular, as one more councillor ought to have gone out, and one more to have been elected.

"But then the pursuers have also to make out that the councillor who ought to have gone out was Mr. Hamilton. That is the very basis of the whole action. Now, that raises a question to my mind of much greater difficulty than the other. It is a question of construction of the statute, and if it were not that we are aided by light from subsequent legislation, I should have had great difficulty in sustaining the contention of the pursuers."

[Then follows the passage as to the councillor who should have been included in the third who fell to retire, as printed in the footnote to No. 119 of these Observations, pp. 199-201.]

"Applying this to the present case, it follows that the defender, Mr. Hamilton, being of that younger class—that is, of those who were elected in 1878—the one who had the smallest number of votes, was the

the burgh has been erected, or under which its affairs are administered. When the charter or act of parliament contains no provisions on the subject, the procedure is regulated by the set of the burgh or by established usage.

3. Of Commissioners of Police in Burghs and Places subject to the General Police Act of 1850 or 1862.

189. Reference must be made to what has already been said as to the order in which commissioners of police have to retire,¹ and as to the tenure of office of senior magistrates of police, and the effect which the provisions of the Acts of 1850 and 1862 on that subject have on the ordinary rule of retirement of commissioners.² The observations as to the various circumstances which interfere with the ordinary triennial retirement of councillors,³ apply generally to commissioners of police, subject always to the remarks—(1) That the provisions under which, in royal and parliamentary burghs, treasurers, equally with provosts and chief magistrates, hold office for three years from the date of their election, do not extend to commissioners of police elected under the Act of 1850 or 1862; (2) That the period at which commissioners are annually elected in burghs which have adopted the Act of 1850 is determined by the date at which the first election of commissioners took place,⁴ and does not, as in royal and parliamentary burghs, necessarily occur on the first Tuesday of November; and (3) That the annual election of commissioners in burghs which have adopted the Act of 1862 takes place, under the provisions of the General Police and Improve-

one who ought to have gone out ; and, therefore, I am prepared to grant decree of reduction and declarator in favour of the pursuers, the conclusion for statutory penalties having been abandoned."

¹ See No. 160 of these Observations.

² See No. 168 of these Observations.

³ See Nos. 183, 184, 185, and 186 of these Observations.

⁴ See Nos. 25 and 29 of these Observations.

ment (Scotland) Amendment Act, 1878, on the first Tuesday of November, as in royal and parliamentary burghs.¹

¹ Section 3. See Nos. 25 and 29 of these Observations, as altered by the provisions of the General Police and Improvement (Scotland) Amendment Act, 1878, which appoints all annual elections of commissioners of police in burghs and places which have adopted the Act of 1862, to take place on the first Tuesday of November in each year.

XII. — EFFECT OF ANNULMENT OF ELECTIONS, AND LIMITATION OF THE PERIOD WITHIN WHICH PROCEEDINGS FOR VOIDING THEM CAN BE BROUGHT.

1. In Royal and Parliamentary Burghs.

190. Previous to the passing of the Act 3 & 4 Will. IV., cap. 76, such a defect or irregularity in the election of any one councillor of a royal burgh as resulted in his election being reduced or otherwise declared void terminated the existence of the entire council of which he was a member, and practically disfranchised the burgh for the time. The principle of this rule of law was obvious. Under the old system the elective as well as the administrative power was vested in the entire council, and the want of one member rendered the body incomplete. How then could it be completed? Not by the council itself, for its entirety was destroyed. The elective body was out of existence, and could not possibly resuscitate itself.¹ Under such circumstances the only

¹ The principle is clearly expounded by Lord Ivory in the case of *Kidd v. The Magistrates of Anstruther Wester*, 17 December 1852, 15 D. 257. The case is instructive, though it had reference to a royal burgh which was specially exempted from the provisions of the Act 3 and 4 Will. IV., cap. 76, and which exemption was held to extend to the whole provisions of that act. At the annual election of 1851-2 the full number of councillors required by the set of the burgh,—as the set was fixed by usage for more than a century,—was elected, but one of the persons elected was in minority. Minority was held to be disqualification, and the whole election was declared null and void. On the law and practice in regard to null elections, Lord Ivory said,—“I must say that this is a question about which no one, in those days when election cases were so frequent, would have had any doubt. It is clear that one of the parties elected was disqualified. The disqualification of minority is absolutely fatal. The want of one member has rendered the council incomplete. Then, how is it to be completed? It cannot be done by the parties pointed out by the statute to make the election, for they were the members of the old council, and that council is no more. It cannot be done on the day appointed by the sett, for that was the day when the incomplete election was made. Thus it is not competent to complete

remedy was in the crown, from which the burgh had derived, or was presumed to have derived, its existence and privileges, and which could alone endow it with new life.

In ancient times it not unfrequently happened that, in consequence of the disturbed state of the country, or, it might be, owing to negligence or other cause, elections of councils were not held at the time prescribed by charter or by statute. Still more frequently, in later times, elections of one or more individuals were reduced or set aside by reason of irregularities, or of the disqualification of the persons elected, or other causes. But the result under all circumstances was substantially the same. The burgh lost its council, and remained disfranchised till it pleased the sovereign, in the exercise of the royal prerogative, to authorise a new election, and to prescribe the conditions under which such election was to take place.¹ In the meantime, the burgh

the election. And this, I think, is the reason why we do not find in the books any statement to the effect that the election of a disqualified person disfranchises the burgh—though I appeal to any one who had much practice in those cases if such was not the rule. The council was a body which could exist only in its entirety. That being broken, it must fall—1st, because the time for completing it was past : 2d, because there was no body in existence to make the election. Here it was at first tried to raise a question as to the number of councillors, but it is quite settled by the usage at fifteen ; and on the day of election only fourteen were elected. It was also attempted to draw a distinction between a blunder in an election, and a failure to elect at all. I do not remember of any case of failure to elect at all. I have looked into the petitions in various of the old cases, and they are always to the effect, that a disqualified person had been elected, and on that account the whole election had fallen. We are not under the 37th section of the late act [3 and 4 Will. IV., cap. 76], but are in every respect under the old law—and under that law we must sustain the complaint and give judgment as craved.”

¹ The warrant for new elections under the old system sometimes authorised the burgesses to proceed to a full election, as in the case of Edinburgh in 1689 and 1746 [Wight's Inquiry into the Rise and Progress of Parliament, p. 360 ; Maitland's History of Edinburgh, pp. 132, 133 ; Arnot's History of Edinburgh, p. 250], Anstruther Wester in 1767 [Wight, pp. 486-488], and Aberdeen in 1818 [Kennedy's Annals of Aberdeen, vol. ii., p. 225] ; sometimes it authorised the former magistrates and councillors to elect a new council and magistracy, as in the case of Montrose in 1746 and Stirling in 1773 [Wight, pp. 358, 485] ; sometimes it empowered the former magistrates alone, without the concurrence of the council, to nominate new magistrates and a council, as in the cases

continued to exist, and to retain its property, and till its council was restored, its affairs were managed by persons appointed by the Court of Session.

191. The Act 3 and 4 Will. IV., cap. 76, effected a total revolution in the municipal system of royal burghs. It constituted a new body of electors, consisting of persons resident in the burghs who possessed a prescribed qualification; and it appointed annual elections to take place at which the vacancies occasioned by the retirement of the councillors in rotation, or by resignation or otherwise, were to be filled up by the qualified electors. It also provided that no irregularity or nullity in the election of any councillor or magistrate should annul or affect the election of other councillors or magistrates not liable to the same grounds of objection, but those particular elections only in which such irregularity or nullity had occurred.¹ Thenceforward, therefore, the failure to elect one or more councillors did not terminate the existence of the council; the voidance of an election even of the whole council did not disfranchise the burgh. The powers of the qualified electors, as well as their right to exercise their privilege of nominating magistrates and councillors at each annual election, stood unaffected by any such incident. The necessity for the interference of the crown was thus superseded. There might still be

of Aberdeen and Perth in 1716 [Kennedy's Annals of Aberdeen, vol. ii., p. 226; Wight, p. 358]; and sometimes it empowered the same persons as might have elected the magistrates and other office-bearers at the time when the regular election was prevented, to proceed and complete such election, as in the case of Aberdeen in 1746 [Kennedy's Annals of Aberdeen, vol. ii., p. 228]; and Dundee in 1831 [Warden's Burgh Laws of Dundee, p. 108]. In the case of Montrose [Coutts and others v. Doig and others, 23 January 1747; Kilkerran's Decisions, p. 106] one of the judges of the Court of Session observed that the warrant from the crown to the magistrates and council to make a new election had been ill-advised, and that as the crown could not refuse the corporation a warrant to meet for election, neither could it grant such warrant otherwise than according to the rights of the corporation, that is by a full election, the right being in the burgesses by the lapse of the day for the meeting of the council to choose their successors.

¹ Section 37 of 3 and 4 Will. IV., cap. 76.

a period of suspension in the government of the burgh—an *interregnum* during which its affairs might be carried on by temporary managers appointed by the Court of Session; but the powers of such *interim* managers necessarily ceased whenever a new council was elected by the qualified electors.

In like manner the Act 3 and 4 Will. IV., cap. 77, created an electoral body in parliamentary burghs, and provided for the due election of the councils and the appointment of the magistrates of these burghs. Its enactments for these purposes are substantially similar to those which the Act 3 and 4 Will. IV., cap. 76, contains with reference to royal burghs; and the clause as to irregularity or nullity in the election of magistrates and councillors is precisely the same.¹

192. The law as regards both royal and parliamentary burghs was still further amended in this respect by the Act 16 Vict., cap. 26, which provides that no action by way of reduction, declarator, suspension, or otherwise, for reducing the election of a councillor, magistrate, or provost of any royal or parliamentary burgh, or for having the same found null, or for interdicting any party who has been elected to any of these offices from acting as such, shall be instituted, nor any summons executed, nor any suspension intimated concerning the same, after the lapse of one month from the date of the election; and that all such summonses and suspensions, executed or intimated respectively within the month, shall be deemed summary processes, and have precedence as such in the rolls of the Court of Session.² It also provides that the acts and proceedings of a town council prior to the date when the election of any of its members has been legally set aside

¹ Section 33 of 3 and 4 Will. IV., cap. 77.

² Section 5 of 16 Vict., cap. 26.

or found null, shall be valid and effectual, notwithstanding the nullity or irregularity of the election of any one or more of the councillors; and that the actings of any provost or magistrate whose election has been set aside or found null, prior to its being so set aside or found null, shall not be liable to challenge on that ground.¹

¹ Section 6 of 16 Vict., cap. 26. This enactment seems to be merely declaratory of the common law. In the case of *Livingstone v. The Presbytery of Hamilton*, 26th June 1846, 8 D., 898, affirmed by the House of Lords, 6 Bell, 469, the judicial proceedings of a presbytery carried through at a time when various ministers of *quoad sacra* parishes sat and voted as members who had no right to do so, was held to be valid, on the ground that the ministers so acting without right were held and reputed members of the presbytery, acted in *bona fide*, and had a colourable title, and that the constitution of the court was not challenged till after the proceedings complained of were carried through. The Lord Ordinary (Cunninghame) thus stated and illustrated the principle of that decision:—"He conceives it to be a point admitting of no denial in the law and constitution of this country, that the proceedings of judicial and corporate bodies, within the ordinary and competent sphere of their duties, are in general not subject to question merely because certain members concurred in the official act whose title has been afterwards challenged and set aside. This is in some degree unavoidable in the business of every corporate body. The electors of public functionaries, or the patrons or other constituents of corporations and magistrates, may be mistaken in the act or mode of nomination, and, when they are so, the nomination is reduced, or the election declared void, by the competent tribunals; but the ministerial and judicial acts of the ostensible office-bearers, within the scope of their authority, have uniformly been upheld and supported as unchallengeable. Thus, in Parliament itself, there are probably, on each general election, from thirty to forty members of the House of Commons returned in the first instance, who are afterwards found to have been chosen by unqualified electors, or to be otherwise ineligible—yet it has never been supposed that the resolutions or acts of the House, though sometimes carried by the very members afterwards found incapable to sit, were liable to any exception. In like manner, it happened every year under the old burghal system in Scotland, that individuals were elected magistrates of burghs by parties without a good title, or under proceedings afterwards found to render the whole election void; but the judicial acts of magistrates so ineffectually elected, in courts of police, and in many other necessary duties, when exercised necessarily, and in *bona fide*, during the time they held office, have never been found invalid, nor sufficient to involve the ostensible magistrate in responsibility, as for illegal acts." The Lord-President (Boyle) adopting the same views observed—"I apprehend, however, that there are principles in our law, as well as in those of other countries, that are justly opposed to the giving effect to any such objection as is urged by this pursuer. Proceeding on the foundation of justice and public expediency, we see that the Roman authorities held that the judicial acts of one who had been elected prætor, though confessedly a slave, and who could legally hold no public office, were valid, and could not be chal-

These provisions apply not only to general elections of magistrates and councillors, but to incidental elections in the course of the year.¹

¹ *Drew v. Maxwell* 14 November 1854 ; 17 D., 51 ; 27 Jurist, 3.

lenged. That response of the Roman sages must have rested on the ground that he was *de facto* in possession of the office of prætor, and exercise of its powers, and that it was important for the public interests that his acts should be sustained. We see also, from the quotations in the case for the defenders, that our institutional writers, Stair and Erskine, give full sanction to the principle of the civil law. Lord Stair explicitly states, 'That there is no relevant objection, in the first instance, against the extracts of clerks, or instruments of notars, where they are competent, or against summonses and diligence by writers, or executions of messengers, by denying that they were clerks or notars, or by denying that judges or arbiters had authority ; and if the same be alleged by way of reduction, holden and repute will be a sufficient defence.' We see, from the early cases that have been cited, that effect was accordingly given to the principle thus clearly announced ; and, in addition, I may refer to another case, namely, that of *Stuart v. Hay*, of 10th November 1676, in which the act of a messenger, who had actually been previously deposed, was sustained,—'it being sufficient that the messenger was officiating at that time, and holden and repute a messenger.' There could not surely be a doubt that, though the election of the magistrates and councillors of a burgh was challenged as having been illegal, and ultimately set aside (as has frequently been the case in Scotland after a long litigation), that their judicial acts, while *de facto* in possession of office, and generally held and reputed as magistrates, would not be set aside as invalid." Lord Jeffrey observed that "the principle of law under which acts done by *putative* functionaries—whether individual or corporate—have ever been recognised as valid, . . . in no case requires more for its application than the concurrence of these two circumstances : 1st, That the acts were performed in a *bona fide* belief that they were competently performed ; and, 2d, That this belief was so far reasonable or colourable as to have produced a general impression that it was well founded ; and to have made it natural, if not unavoidable, for those affected by such acts to rely on their validity. Whenever these two requisites concur, the law will support the acts, without any regard to the other circumstances of the case. . . . The principle of 'holden and reputed,' I think, does in short apply to everything done, so far as it has been done. Such, I think, is the course followed in all parallel cases, viz., that the acts done are not annulled *retro*, where the flaw is detected before the final conclusion, but all that is done is left untouched. Look, accordingly, at the case of parties acting judicially as magistrates with a putative title to the character of magistracy, but without a true right to the office. The acts done by such persons, in the exercise of their functions, are uniformly sustained, though their title may have been under challenge from the first ; for it is quite settled, that the judicial acts done by a bailie, whose right is under challenge are valid, though it afterwards turns out that he was not *de jure* entitled to the character. This rule applies to all his judicial acts, whether these go to disposing of the relevancy, or taking steps in the proof, or otherwise dealing incidentally with the cases which come before him, though not consummated in his time,

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

193. In burghs of regality and barony not being parliamentary burghs, the effect of the annulment of

by a final executorial decree. All such acts stand as valid acts; and the processes, as advanced by those acts, are carried on to the successor, who has a good title, and thus supersedes the putative bailie in the office. In the same way, there is another remarkable example of the rule, in the unquestionable validity of all the acts of the legislature, though carried by the votes of members who had no right to sit." In reviewing the judgment of the Court of Session in the case of Livingstone, the Lord Chancellor (Cottenham) stated the rule of law in Scotland to be this, that, "in the case of a party professing to hold an office, and holden and reputed to hold that office, of which he was exercising the duties, the acts done by him shall be valid; although upon investigation it turn out that he had no right to the office of which he thus performed the duties." He then referred to the rule of law in England applicable to such cases, as stated in *Croke, Elizabeth*, and by Lord Chief-Justice Abbot, in the case of the *Margate Pier Company* against *Hanman* [3 B. and Ald. 266]. In this case the Lord Chief-Justice observed:—"Many persons acting as justices of the peace, in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and, although all acts properly corporate and official done by such persons are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that the acts done should be sustained." "We therefore find," the Lord Chancellor continued, "that—according to the law of Scotland, as established by the authorities to which I have referred; and the law of England, as established in like manner by the authorities, and which authorities concur, and most reasonably and rationally concur—the rule is, that as to those who are known and 'holden and reputed,' according to the language of the cases, to be the proper possessors of and exercising the duties of an office, their acts shall be good so long as they hold and exercise the duties of those offices; although, in point of fact, they may not have, upon investigation, any title to the offices of which they were so exercising the duties." The Lord Chancellor's statement of the rule in England, it will be observed, made no distinction between acts corporate and acts judicial, and, though both Lords Brougham and Campbell deal with the case of a presbytery acting in a judicial character, the principles of their judgments seem to apply to all actions of a body administrative as well as judicial. "I can see no difference, whatever," says Lord Brougham, "between the case of a presbytery, as far as regards these *quoad sacra* ministers being a part of the presbytery, and the case of any other public body acting by persons whom they have acknowledged as members of their body, which persons are made members of their body by a particular qualification of any sort, or by a particular mode of appointment of any sort; as, for instance, by election or by selection by a superior authority. By popular election we will say, as representatives or by selection by a superior authority. If the presence at

the election of any councillor or magistrate, and the period within which proceedings for voiding any election must be brought, will be determined by the charter, or

any one of its deliberations or decisions of persons who, at the time, were supposed to have a title, but who, by the result of an inquiry, were found not to have a valid title—if their presence at the time, afterwards found to have been illegal, or we will say invalid, should be held sufficient to make null and void and of non-effect all the steps taken, and all the proceedings had by that body of which they had been improperly members, or had been irregular members, or with a void qualification—if, because they were so void of qualification, the whole steps which were taken, and the decisions come to, or the acts done by that body were, therefore, to be rescinded as void in themselves, I consider that consequences of the most grievous nature, entailing the highest possible confusion and public inconvenience, would result.” Lord Campbell observed :—“ This is the act of a community where there was an assemblage of gentlemen ; and it is admitted, that if these *quoad sacra* ministers had not been present, all the proceedings of the presbytery would have been regular and valid. My Lords, I am clearly of opinion that their presence does not invalidate what took place, and upon two grounds : first, that the *quoad sacra* ministers had a *prima facie* title, and were there acting *bona fide*, and were believed to have a right to be there as much as the ministers of the different parishes that belonged to the bounds of the presbytery ; and secondly, that if they had been strangers, as there was still clearly a majority in the community in favour of the act done, the act was a valid act.”

Again, in the case of *M'Arthur v. Linton*, decided 9th, and reported 13th February 1864, 2 Macph., 659, an objection was taken to a bailie who sat in the Police Court, in the administration of the Public Houses Amendment Act, 1862, on the ground that he had not been duly elected a bailie of the city of Edinburgh. But the Lord Justice-Clerk (Inglis) said, “ I should not have given a single word to this objection. . It is enough that the party who pronounced the sentence is in possession of the office of bailie, and holden and reputed a judge. It does not matter whether he holds the office rightly or wrongly. That has been the law of Scotland from the earliest times, and it has been so laid down, not with reference to judges alone, but with reference to all public officers, by Lord Stair, in his *Institutes*, 4.42.12.” [*vide, ante* p. 311], “ ‘ for if these objections were allowed in the first instance, they might be generally alleged in all processes, and nothing would proceed, unless all these authorities were proved, which would be a public prejudice.’ There has been no departure from that doctrine in a single instance in the history of our law . . . and the rule is one of such general importance, that I cannot allow a doubt upon it to be suggested without taking pains to put an end to that doubt.”

See also *Marten v. Stewart*, 25th January 1853 ; 15 D., 312 ; 25 Scot. Jur., 193. In this case an application was made to the Court of Session to appoint managers to administer the affairs of the burgh of Greenock, pending a challenge of the election of the magistrates and council, and before it had been found that the burgh was without any legal council or magistracy. The competency of such an application was questioned, on the ground that the petitioners had designed themselves the magistrates and town council of Greenock, and the petition was ultimately

act of parliament, by which the burgh has been erected, or under which its affairs are administered. When the charter or act of parliament contains no provision on the subject, the whole election of councillors and magistrates for the year will probably be held to be annulled, and proceedings for voiding the election may, it is thought, be taken at any time during the tenure of office of the councillor or magistrate whose election is objected to. The validity of the acts done by the person in possession of office will, however, be doubtless sustained on the principles expounded in the cases of *Livingstone v. The Presbytery of Hamilton*, *Martin v. Stewart*, and *M'Arthur v. Linton*.¹

¹ See footnote to No. 192 of these Observations, pp. 315-318.

withdrawn; but Lord Ivory expressed an opinion that the acts of the magistrates *bona fide* in possession were valid, notwithstanding the challenge of their election. He said:—"I have no hesitation in saying, that my doubts are not removed by the discussion at the last calling; I am not satisfied with the precedent of the Banff case [Forbes, 22d December 1838, 1 D., 351]. But is there any greater difficulty in the petitioners continuing to act, pending the challenge, than that which must have occurred in innumerable other cases, in which there have been complaints tending to annul the whole election? In the case of Edinburgh (6th January 1818, not reported), the whole functions of the magistrates, judicial and administrative, were carried on, not only in the face of a challenge, which lasted several years, but, if my recollection does not err, after a first judgment had been pronounced, setting aside the election, and the question was kept open only by a reclaiming petition. The case of the town of Haddington (Muirhead, June 30, 1748; M. 2505) is also instructive. For there the rights of a council *bona fide* in possession, though their election was ultimately set aside, were supported so very far, that the accounts incurred by them while *de facto* in office, in unsuccessfully defending the election, were sustained against the corporation at the instance of their agent, after they themselves were ousted. On looking at the familiar authorities of Wight and of Bell, I find no allusion whatever to managers, except in the case of actual vacancy."

The English Municipal Corporation Act, 5 and 6 Will. IV., c. 76, declares that "all acts and proceedings of every person in possession of the office of mayor, alderman, councillor, auditor or assessor," shall, notwithstanding the disqualification or want of qualification of the holders, be as valid and effectual as if such persons had been duly qualified. This provision, it was thought, might not extend to the case of an election held before a presiding officer who had not a good title to his office. It was therefore provided by 7 Will. IV. and 1 Vict., c. 78, sec. 1, that no election of any corporate officer should be liable to be questioned by reason of any defect or want of title in the presiding officers at such election, provided the officers were at the time *de facto* in possession of the office, giving the right to preside.

3. In Burghs and Places subject to the General Police Act of 1850 or 1862.

194. Under the Acts of 1850 and 1862, as has been seen,¹ every person who considers that he ought to have been returned as a commissioner may lodge a complaint in writing, signed by himself or by some person duly authorised on his behalf, with the commissioners assembled at the first meeting after the annual election, and the commissioners must thereupon remit to a committee of three or five of their number to inquire into the merits of the disputed election, and their report is final. When there is an equality of votes in any election, the commissioners are required to determine which of the candidates shall be preferred. No election can be quashed or set aside on account of any misnomer, omission, or other informality. And every person returned as a commissioner is entitled to act until, on a scrutiny, his return is quashed or set aside. The commissioners are, moreover, entitled to act though from any cause the full number of commissioners is not filled up.² These provisions are not affected by the Ballot Act; and it has been held that they prescribe the only mode in which elections of police commissioners can be challenged. In the case of *M'Donald and Others v. Robertson and Others* (Maryhill Election Case),³ a householder, who was not a candidate, challenged the election. In support of his right to have his challenge disposed of by the court, he pleaded that the commissioners were required to appoint a committee to investigate and dispose of claims by or on behalf of candidates only; that every householder had an interest in the result of the election, and was entitled at common law to challenge

¹ See No. 157 of these Observations.

² Sections 31 and 33 of the Act of 1850. Section 48 of the Act of 1862.

³ *M'Donald and Others v. Robertson and Others*, 17th May 1876. Session Cases (Fourth Series), vol. iii., pp. 645-651.

irregularities or deviations from the provisions of the act under which the election was conducted; that neither the act of 1850, nor the act of 1862, requires objections by householders, who are not candidates, to be stated to the commissioners, nor empowers the commissioners to deal with such objections, nor specifies any time within which such objections shall be stated; and that neither act excludes challenge by an elector, nor makes provision for an inquiry in such circumstances. Lord Young held, however, that the objections of the householder could not be entertained. The procedure provided by section 31 of the act of 1850, he observed, "applies only when the seat is claimed (as it is here) by a disappointed candidate, but I am disposed to think it is according to the true meaning of the act that where no such claim is made the objection shall be final, as against such an objection as that here presented. I so limit the proposition because there may be objections of a character to warrant action in this court." The Lord President (Inglis) said, "If there is to be any scrutiny of votes, the only competent mode of having it done is by a committee of the commissioners under section 31 of 13 and 14 Vict., c. 33, and their decision is final." Lord Deas said, "I concur in holding that there can be no scrutiny except under section 31 of 13 and 14 Vict., c. 33, and that the inquiry can only take place before a committee of the commissioners, whose decision is final."

XIII.—PROCEEDINGS IN THE EVENT OF NULL OR IRREGULAR ELECTIONS.

1. In Royal and Parliamentary Burghs.

195. Previous to the passing of the Act 3 and 4 Will. IV., cap. 76, as has been seen,¹ the failure to elect or the voidance of the election of a single councillor of a royal burgh disfranchised the burgh, and necessitated the appointment of managers to carry on its affairs till a new council and magistracy were elected. That condition of matters has been remedied by the successive statutes 3 and 4 Will. IV., cap. 76, 15 and 16 Vict., cap. 32, the Act 16 Vict., cap. 26, and the Municipal Elections Amendment (Scotland) Act, 1868.

(1.) The Act 3 and 4 Will. IV., cap. 76, enacted that when any royal burgh, not included in Schedule F annexed to the Act (which schedule is repealed by section 3 of the Municipal Elections Amendment (Scotland) Act, 1868), was without a legal council or magistracy, all the functions directed by the act to be performed by the existing magistrates or councils should be performed by one or more of the managers who might, by any lawful appointment, be then in the actual administration of the affairs of the burgh;² and further, that no irregularity or nullity in the election of a councillor or magistrate should annul or affect the election of other councillors or magistrates not liable to the same grounds of objection.³

This act, it has been held, vested in the managers appointed by the court all the functions directed to be performed by magistrates for carrying into effect a new election, and superseded the necessity for a royal warrant when there were managers to discharge the functions directed by the statute to be performed by the magistrates at elections.⁴

¹ See No. 190 of these Observations. ² Section 27. ³ Section 37.

⁴ *White v. Scott*, 16th October 1849, and reported 7th March 1854; 16 D., 798; 26 Jurist, 375. In this case an election of councillors

(2.) The Act 15 and 16 Vict. cap. 32, provided that where any burgh, not contained in Schedule F annexed to the Act 3 and 4 Will. IV., cap. 76 (which schedule is repealed by section 3 of the Municipal Elections Amendment (Scotland) Act, 1868), should be without a legal council, and be under the administration of managers lawfully appointed, the qualified electors of the burgh should, before the first Tuesday of November after the passing of the act, or after the appointment of the managers, proceed to elect councillors,¹ in the way and manner prescribed by the Acts 3 and 4 Will. IV., cap. 76, and 15 and 16 Vict., cap. 32.² It also required the sheriff, on the

¹ Section 7.² Section 8.

for the burgh of Banff, which had taken place on 4th November 1851, and had been conducted by the managers appointed by the Court, was sought to be reduced on the grounds, *inter alia*, (1) that the magistrates and council of the burgh having become extinct prior to the election, it was incompetent and illegal to elect a new council or magistracy, except by royal warrant; (2) that the managers had no title or authority to advertise or preside at the election, or to count up the number of votes, or to declare upon whom the election had fallen; and (3) that the passing of the Act 15 and 16 Victoria, cap. 32 (in 1852), which for the first time provided for the case which had happened in Banff, showed that the matter was not provided for by previous legislation. The Court, however (affirming the judgment of Lord Anderson), sustained the election. Lord Rutherford thus expounded the grounds of that judgment:—"At the time of this election there was an electoral body, possessing all the necessary privileges. There was nothing wanting but the machinery to carry out the election. There was nothing wanted but a president for the election. The act does not contemplate merely the resignation of one-third of the council. It may happen that the whole council resign, and thus leave the burgh without magistrates. I think, therefore, in a case of this kind, where the electoral body are created of new—where its rights depend on statute—where the resignation of the whole body is contemplated—where there are no means of proceeding pointed out by the Act other than that of managers—it is no extended construction to give the remedy through the managers, to what otherwise would be without remedy. I have the greatest doubt whether this is a case for a warrant from the Crown. In the construction of a statute of this kind, I think we do not err against any known canon of construction, when we give all that is necessary to make the statute work. The statute of 1852 (15 and 16 Vict.) not only takes the managers bound to proceed, but it provides that they shall do so on the first Tuesday of November after their appointment, and authorises the sheriff, on application made to him, to appoint the manager under whose authority the proceedings are to take place. I think this circumstance does not discountenance the construction put on the Act 1853 (3 and 4 Will. IV., cap. 76)."

application of any qualified elector of the burgh, to appoint one of the managers of the burgh to discharge the duties directed by the Acts 3 and 4 Will. IV., cap. 76, and 15 and 16 Vict., cap. 32, to be performed by the retiring provost and senior magistrate of such burgh in reference to such election.¹

(3.) The Municipal Elections Amendment (Scotland) Act, 1868, contains provisions precisely similar with reference to *all* royal burghs,² and makes no exception in favour of the burghs specified in Schedule F of the Act 3 and 4 Will. IV., cap. 76, which schedule it repeals.

(4.) The Acts 3 and 4 Will. IV., cap. 76, 15 and 16 Vict., cap. 32, and the Municipal Elections Amendment (Scotland) Act, 1868, applied only, as will have been observed, to the cases of royal burghs without a legal council, and under the administration of managers. But the Act 16 Vict., cap. 26, passed in 1853, made provision for the first time for the election in royal burghs, not under the administration of managers, of councillors or magistrates in room of those whose election was declared null or irregular. It enacted that in all cases in which the election of councillors in any royal burgh shall have been legally reduced or found to have been null, the Court of Session, in either of its Divisions, shall, on the application by petition of one or more of the registered electors, grant warrant for a new election of councillors in room of those whose election shall have been so reduced or found null, to take place on a day to be fixed by the Court, not sooner than ten nor later than fourteen days from the date of the warrant. As soon as the warrant is granted, the principal Clerk of Session, who is clerk to the petition, must transmit a certified copy of it to the town-clerk of the burgh, who must, immediately on receipt, give intimation of the election by notices affixed to the door of the parish church or churches in the burgh. The election must thereupon proceed, on the day so fixed, in the manner provided for

¹ Section 7.

² Sections 13 and 14.

the annual election of the councillors in such burghs; and the acting provost or senior magistrate, or failing there being at the time any provost or magistrate, one of the councillors to be nominated by the sheriff of the county or his substitute, must discharge the duties, and execute the powers directed by the Act 3 and 4 Will. IV., cap. 76, to be performed by the provost or senior magistrate at the annual election of councillors. The necessary expenses incurred in obtaining the warrant for the new election is recoverable by the electors by whom the same may have been incurred from the treasurer of the burgh, who is authorised to charge the same on its funds.¹ The councillors so elected are, in regard to tenure of office and in all other respects, in the same situation as if they had been elected at the annual election at which the councillors whose election has been reduced or found to have been null, were elected.² In other words, as the writer understands this provision, each councillor so elected takes the same position, and holds office for the same period, as the person whose election has been reduced, or found to have been null, would have done had his election been sustained.

196. Immediately after the election of councillors in any royal burgh is completed, under the provisions of the Act 15 and 16 Victoria, cap. 32,³ or of the Municipal Elections Amendment (Scotland) Act, 1868,⁴ the councillors elected in terms thereof must proceed to elect from among their own number a provost or chief or senior magistrate, and other magistrates a treasurer, and the other usual and ordinary office-bearers, fixed by the set or usage of the burgh, and the managers of any charitable institution which may be connected with it, and whose appointment is vested in the magistrates and council, all in the manner provided by the Act 3 and 4 Will. IV., cap.

¹ See section 3 of the Act 16 Victoria, cap. 26.

² See sections 1 and 2 of the Act 16 Victoria, cap. 26.

³ Section 8.

⁴ Section 14.

76. At such elections the councillor who had the greatest number of votes at the election of councillors presides, and has a casting or double vote in case of equality. In the event of two or more councillors having an equal number of votes, one of the managers of the burgh, to be appointed by the sheriff, on the application of any qualified elector of the burgh, presides and has a casting but no deliberative vote. Immediately on the completion of the election of magistrates, the managers of the burgh cease to hold office, and to administer the affairs of the burgh; and all succeeding annual elections of councillors and magistrates take place at the time and in the manner before described.¹ In all cases in which the election of a councillor to the office of provost or magistrate, or the election of any councillor, who may have been thereafter appointed provost or magistrate, has been legally reduced or found null, the town council must, at its first ordinary meeting thereafter—the full number of the council being always complete—elect a provost or magistrate who, in regard to tenure of office, and in all other respects, occupies the same situation as if he had been elected when the provost or magistrate, whose election was reduced, or found null, or fell, was elected.²

197. Provision is made by statute, as has been seen, for supplying vacancies in the council or magistracy, or office-bearers of royal burghs, occasioned by death, disability, or resignation;³ or in which the election of a councillor or magistrate has been “legally reduced, or found to have been null.”⁴ Provision is also made for filling up, by the same procedure as in the case of a double return or of a councillor declining to accept office, a vacancy

¹ See the Act 15 and 16 Victoria, cap. 32, section 8, and the Municipal Election Amendment (Scotland) Act, 1868, section 14.

² See 16 Victoria, cap. 26, section 4.

³ 3 and 4 Will. IV., cap. 76, section 25; 3 and 4 Will. IV., cap. 77, section 23. See Nos. 171 to 178 of these Observations.

⁴ 16 Victoria, cap. 26, sections 1 and 4. See No. 195, sub-sections (1), (2), and (4), and No. 196 of these Observations.

which has not been supplied at an annual election by reason of the town-clerk not receiving intimation, in the manner prescribed by law, of the names of persons proposed for election sufficient to supply the vacancies in any burgh or ward, or by reason of the requisite number of councillors not being elected, from any cause whatsoever.¹ But no provision has been made for supplying a vacancy occasioned by the retirement of a councillor as one of the third, and of his place not being supplied at the annual election, or within the period during which the procedure applicable to the case of a double return or of a councillor declining to accept may be adopted. In such a case the only course seems to be to wait till the next election of councillors, and then supply the vacancy, along with any other that may have occurred.²

¹ 31 and 32 Victoria, cap. 108, section 9. See Nos. 124, 125, and 126 of these Observations.

² In the case of the burgh of Rutherglen, referred to in No. 119 of these Observations, it was held that Mr. Hamilton had ceased to be a member of council, previous to the annual election of councillors in November 1875, and that he was thereafter ineligible to be elected a bailie of the burgh, and was not lawfully and duly elected to that office at the annual election of magistrates in that year. A vacancy both in the council and magistracy of the burgh was thus created; and Mr. Watson and Mr. Balfour were consulted on 20th March 1876, as to whether any of the statutory provisions referred to in the text could be applied in filling up the vacancy in the council and magistracy, and if they could not be so applied, what course should be adopted. They gave the following opinion:—"We are of opinion that none of the statutory provisions referred to are applicable to the case which has occurred, or could be used (without liability to challenge) for filling up the vacancy in the town council, and police commissioners caused by Mr. Hamilton's removal. The Act of 16 Vict., c. 26, is inapplicable, because the vacancy has not been occasioned by Mr. Hamilton's election being found null or reduced, but by the expiry of his term of office, and the provisions of 3 and 4 Will. IV., c. 76, section 25, are inapplicable, because the vacancy has not occurred in the course of the year by any disability on the part of Mr. Hamilton. The present case appears to us to fall within the description of events provided for by 30 and 31 Vict., c. 108, section 9, but the procedure directed by that section is not available, because the period within which alone that provision could be adopted has long ago expired.

"There does not appear to us to be any course open, except to leave the council in its present condition till the election in November next, when the vacancy caused by Mr. Hamilton's removal can be filled up along with any other vacancies which may occur before that time. This opinion was acted upon.

198. The Act 16 Vict., cap. 26, meets the great majority of cases in which, but for its provisions, it would have been necessary to apply to the Court of Session to appoint managers. It may be convenient, however, to refer to some points of law and practice connected with such appointments.

(1.) In the selection of the persons to be appointed managers, the Court exercises its discretion, having regard to the special circumstances of each case. The following cases illustrate the manner in which it has acted in making such appointments. The burgh of Kilrenny having been disfranchised, the persons who had last been lawfully elected magistrates were appointed managers.¹ An election of the magistrates of the burgh of Dundee, having been reduced, after a litigation of more than two years, the Court appointed, as managers, such of the bailies in office at the date of the reduction as had been members of council prior to the invalid election, along with the dean of guild, convener of the trades and treasurer at the time of the appointment.² Where under the influence apparently of party feeling, two sets of nominees were suggested as managers of the burghs of Dysart and Kinghorn,³ the Court remitted to the sheriff in each case to suggest proper persons;⁴ and the same course was adopted in the case of the burgh of Anstruther Wester, where no persons were suggested by the petitioners.⁵ All the councillors of the burgh of Banff, except two, having resigned, the Court, in October 1849, appointed the two councillors who did not resign to be managers. In the following year all the councillors

¹ *Reekie v. Gardner*, 10th February 1829; 7. S., 379.

² *Kay v. Bell*, 11th March 1830; 8. S., 7. 9.

³ Kinghorn was one of the royal burghs exempted from the provisions of the Act 3 and 4 Will. IV., cap. 76.

⁴ *Millar v. Jervis*, 20th June 1840; 2 D., 1181. *Greig v. Greig*, 21st January 1842; 4 D., 422; 14 Jurist, 177.

⁵ *Kidd and Others v. Young and Others*, 11th March 1853; 15 D., 555; 25 Jurist, 324; 2 Stuart, 303.

who had been elected in November 1849 having again resigned, the Court appointed managers of new.¹

(2.) The powers of the managers are defined in the act and warrant of their appointment. In the Dundee case, above referred to, the managers were empowered "to act in the management of the ordinary affairs of the burgh aye and until this nomination shall be recalled, or shall be superseded by the appointment of a regular and ordinary magistracy for the burgh." In another case,² three persons were appointed "to be managers of the affairs of the burgh of Dysart until the corporate rights and privileges of the burgh shall be restored, for the special purposes of receiving resignations or giving sasines on any lands held burgage of the said burgh, appointing taxers or stentmasters to collect King's subsidy, regulating the weights and measures within the said burgh, and taking charge, in the meantime, of such funds and patrimonial interests as fall under the management of the different office-bearers of the burgh, and generally to act instead, and exercise the functions, of the magistracy and town council of the said burgh." In a third case³ the Court appointed the then provost, magistrates, and council of the burgh of Banff to be "managers of the affairs of the said burgh, and of the various trusts and charities therewith connected, with such powers in the case of each individual as would naturally fall to him in the special capacity and character in which he was elected;" and more especially appointed "the then bailies to be managers for the special purpose of receiving resignations, giving sasines in lands held burgage of the said burgh, conducting the judicial business of the burgh court, and otherwise performing and executing the whole functions of magistrates within the said burgh; and in like manner appointed the then

¹ Whyte v. Scott, 16th October 1849. Reported 7th March 1854; 16 D., 798; 26 Jurist, 375.

² Philp and Others, 18th January 1832; 10 S., 199.

³ Forbes v. Watt, 22d December 1838; 1 D., 351.

treasurer to be “manager for the special purpose of performing the whole duties ordinarily belonging to the office of treasurer;” and the then dean of guild to be “manager for the special purpose of performing and executing the duties ordinarily belonging to the office of dean of guild.” In a second appointment of managers of the burgh of Dysart,¹ three persons were “nominated with power to any two of them to act in all matters connected with the affairs of the said burgh until the corporate rights thereof shall be restored, and for the special purposes” set forth in the appointment of 1832, to which reference has already been made. In the case of Banff all the councillors except two having resigned, the court appointed the two who remained to be managers of the burgh, with special power to them to preside at the next annual election of magistrates.² In a subsequent case,³ an application was made to the Court to appoint managers of the burgh of Anstruther Wester; but Lord Ivory called attention to the circumstance that special powers were asked to the managers to grant certificates to sell exciseable liquors under 9 Geo. IV., cap. 58, and to act as members of the parochial board under 8 and 9 Vict., cap. 83, and he observed that these were statutory powers conferred on particular persons, which it was doubtful whether any others, although authorised by the Court, could perform. The Lord President thereupon suggested that the prayer of the petition should be amended by leaving out any reference to these powers, and that the petitioners might afterwards apply for them if they found it necessary to do so, and could satisfy the Court that they had power to grant these powers. The petition was amended accordingly, three persons were appointed managers, and the other powers sought were granted.

¹ *Miller v. Jervis*, 20th June 1840 ; 2 D., 1181.

² *Whyte v. Scott*, 16th October 1849. Reported 7th March 1854 ; 16 D., 798 ; 26 Jurist, 375.

³ *Kidd v. Young*, 11th March 1853 ; 15 D., 555 ; 25 Jurist, 324 ; 2 Stuart, 303.

In another case,¹ the two surviving managers of the burgh of Kilrenny,² who had been appointed in 1847, desired to be relieved of the office on account of old age and infirm health, and prayed for the appointment of other qualified persons "to be managers of the affairs of the said burgh of Kilrenny, any two of them accepting and surviving being a quorum, with power to the said managers *to discharge the duties of bailies of the said burgh, to conduct the judicial business of the Burgh Court*, and to act in all matters connected with the affairs of the burgh until the corporate rights thereof shall be restored; and especially for the purpose of granting charters and precepts, and writs of *clare constat* to vassals in lands and heritages belonging to the burgh, of receiving resignations, and giving sasines in any lands, tenements, or heritages held of the said burgh; of appointing taxers or stentmasters to lay on and collect the Queen's subsidy; of discharging the duties to be performed by magistrates, or magistrates and councils of burghs, in virtue of the statutes 2 and 3 Vict., cap. 42, and 7 and 8 Vict., cap. 34, and other acts relative to prisons, and especially of laying on and collecting, or directing the laying on and collecting, of the assessments already apportioned, or which may hereafter be apportioned on the said burgh in the manner prescribed by the said statutes, or otherwise, with power also to the said managers of performing the duties incumbent on magistrates, or magistrates and councils of burghs, under and in virtue of the Act 17 and 18 Vict., cap. 91, entitled 'An Act for the Valuation of Lands and Heritages in Scotland,' and also of the Act 19 and 20 Vict., cap. 58, entitled 'An Act to amend the law for the registration of persons entitled to vote in the election of members to serve in Parliament for burghs in Scotland;' of granting certificates to keep common inns, alehouses, or victualling houses, to sell exciseable liquors

¹ Fowler and Another, 30 Jan. 1867; 5 Macph., 337; 39 Jurist, 131.

² One of the royal burghs specially excepted from the provisions of the Act 3 and 4 Will. IV., cap. 76.

by retail, to be drunk or consumed on the premises in which the same is sold, and otherwise, in terms of the statutes 9 Geo. IV., cap. 58, and 11 and 12 Vict., cap. 49, and other Acts thereanent ; of sitting, acting, and voting as members of the Parochial Board for the management of the poor of the parish of Kilrenny, in virtue of the statute 8 and 9 Vict., cap. 83, and other acts and instructions of the Board of Supervision following thereon ; of appointing members to represent the burgh in the General Assembly of the Church of Scotland, and in the Convention of Royal Burghs in Scotland, *and of appointing one of their number to perform the duties of a commissioner of supply for the county of Fife*, with the power also of admitting and enrolling qualified persons as burgesses of the said burgh on payment of the usual fees of entry ; of regulating the weights and measures within the said burgh ; of setting the lands and common good of the said burgh ; of raising and defending such actions as may be necessary, and of settling the same ; of taking charge of such funds and patrimonial interests as fall under the management of the office-bearers of the burgh ; of appointing one of their own number to be chief manager from time to time during their pleasure, having power to call meetings of the managers, and to preside thereat, and of appointing one of their number, or any fit person, to be treasurer or chamberlain, and to recall his appointment at pleasure, *and likewise with the power of appointing a town-clerk and a procurator-fiscal and other officers*, and generally with the power of exercising the whole functions of the magistracy and town council of the said burgh, and further, to authorise and empower the managers so to be appointed to examine the accounts of the petitioner, and” a deceased manager’s “management, and on the same being found correct, and the balance due therein paid over, to exoner and discharge the petitioners and the representatives” of the deceased manager “of the whole intromissions and management had by them with the funds of the said burgh.” The powers craved in the

two first passages printed in italics were not insisted in, there having been for many years no judicial business to discharge, and the appointment of a commissioner of supply being unnecessary, and the Court having expressed doubt as to the competency of granting power to the managers to appoint town-clerks as prayed for, the third passage printed in italics was also deleted. The new managers were thereupon appointed; and the powers prayed for in the petition as thus amended were granted to them.

All these powers are consistent with the provisions of the Act 3 and 4 Will. IV., cap. 76, section 27 of which empowers any one or more of the managers in the actual administration of a royal burgh without a legal council or magistracy, to perform all the functions directed by that act to be performed by the existing magistrates or councils.

(3.) In all their actings as managers, the persons appointed by the Court must conform to the rules and regulations which would be binding on the magistrates and councillors of the burgh, and are only entitled to interfere in the administration of its affairs at meetings of the managers duly called or authorised.¹

(4.) Whenever a change of circumstances renders such a proceeding necessary or expedient, the Court exercises its discretion in recalling old appointments and making new appointments. Of three managers appointed to the burgh of Dysart in 1838, one went abroad, and another became openly insolvent and granted a general trust-deed for behoof of his creditors. In that state of matters the Court, on the petition of the third manager, held that, without imputing blame to the insolvent manager in respect of his insolvency, it was inexpedient to continue him in the management, and that two new managers should be appointed in the room of the insolvent and of the person

¹ Greig and Others v. Miller and Others, 11th February 1842; 4 D., 662; 14 Jurist, 263.

who had gone abroad.¹ On the petition of two of three managers appointed to the burgh of Kilrenny in 1847, the Court recalled the appointment of the petitioners, who sought to be relieved of the office on account of advanced age and infirmity, and nominated two others.²

(5.) In all the cases above referred to, the royal burghs to which managers were appointed were without any legal council or magistracy at the time; but the Court will not appoint managers where there are magistrates or councillors entitled to exercise the functions of their respective offices, or pending the challenge of the right of the magistrates and council to exercise these functions. Thus, in the case of the burgh of Kirkwall,³ where there was not a sufficient number of qualified persons to constitute a new magistracy and council under the Act 3 and 4 Will. IV., cap. 76, and where under section 18 of that act the former magistrates and councillors retained their functions, the Court refused as unnecessary an application to appoint managers. A similar judgment was pronounced in regard to the burgh of Burntisland.⁴ Subsequently, however, where doubts existed as to the validity of an election of magistrates, the Court, without prejudice to such rights as might by law belong to them,—and the Lord Advocate having intimated that no objection existed on the part of the Crown,—appointed the magistrates to be managers of the burgh of Banff, and of the trusts and charities therewith connected, with such powers as would fall to each in the special character in which he was elected.⁵ But, in a more recent case, the competency of appointing managers to administer the affairs of a burgh pending a challenge of the election of the magistrates and council, and before it had been

¹ *Miller v. Jervis*, 20 June 1840; 2 D. 1181.

² *Fowler and Another*, 30 Jan. 1867; 5 Macph., 337; 39 Jurist, 131.

³ *Spence v. The King's Advocate*, 21st December 1833; 12 S., 275.

⁴ *Ibid.*, p. 277, note.

⁵ *Forbes v. Watt*, 22d December 1838; 1 D., 351. See also footnote to No. 138 of these Observations, p. 239.

found that the burgh was without a legal council or magistracy, was questioned by both the Lord President (M'Neill) and Lord Ivory, and an opinion was expressed that the case of Banff was not to be relied on as a precedent.¹

199. The Act 3 and 4 Will. IV., cap. 77, enacts that when any parliamentary burgh shall be without a legal council or magistracy, all the functions directed by the act to be performed by the existing magistrates or councils shall be performed by one or more of the managers who may by any lawful appointment be then in the actual administration of the affairs of such burgh; and in default of any such managers, by the sheriff or sheriff-substitute of the county. The phraseology of this provision is identical with that of the 27th section of the Act 3 and 4 Will. IV., cap. 76, which applies to royal burghs, except that in parliamentary burghs the sheriff or sheriff-substitute is authorised to act in default of managers. It would therefore appear, having regard to the principles recognised in the case of *White v. Scott*,² in which the 27th section of the Act 3 and 4 Will. IV., cap. 76, was judicially interpreted, that in parliamentary burghs, managers appointed by the Court, or failing managers, the sheriff or sheriff-substitute of the county, may take all the steps necessary for the election of councillors, and thus enable the burgh to recover its rights of self-government. The Act 15 and 16 Victoria, cap. 32, and sections 13 and 14 of the Municipal Elections Amendment (Scotland) Act, 1868, do not apply to parliamentary burghs; but the Act 16 Victoria, cap. 26, extends to them as well as to royal burghs, and provides for the election of councillors in room of those whose elections may have been found

¹ *Martin and Others v. Stewart*, 25th January 1853; 15 D., 312; 2 Jurist, 193; 2 Stuart, 162. See also footnote to No. 138 of these Observations, p. 239.

² *White v. Scott*, 7 March 1854, referred to in footnote 4 to No. 195, sub-section (1) of these Observations.

null or irregular being conducted in the manner in which the annual election of councillors in such burghs are appointed, by the Act 3 and 4 Will. IV., cap. 77, to be conducted. Reference may be made to what has been stated in No. 195, sub-section (4), of these Observations relative to the provisions of the Act 16 Victoria, cap. 26.

200. The provisions of the statutes above referred to seem practically to supersede the necessity for the appointment by the Court of Session of managers of parliamentary burghs. In any case, however, in which such an appointment may be found to be necessary, it can scarcely be doubted that all the powers which may be competently exercised by the magistrates, office-bearers, and councillors of parliamentary burghs would be conferred on the managers of such burghs in the same way as the Court have empowered the managers of royal burghs—in the cases referred to in No. 198, sub-section (2), of these Observations—to exercise the functions of magistrates, office-bearers, and councillors of royal burghs.

201. In all cases in which the election of a councillor of a parliamentary burgh to the office of provost or magistrate, or the election of any councillor who may have been thereafter appointed provost or magistrate of such burgh, is legally reduced or found null, the town council must, at its first ordinary meeting thereafter—the full number of the council being always complete—elect a provost or magistrate who, in regard to tenure of office and in all other respects, is in the same situation as if he had been elected when the provost or magistrate whose election was reduced, or found null, or fell, was elected.¹

No provision exists for supplying a vacancy in the council of a parliamentary burgh caused by the retirement of a councillor as one of the third, and of his place

¹ 16 Vict., cap. 26, section 4.

not being filled at the annual election of councillors, or within the period during which the procedure applicable to the case of a double return or of a councillor declining to accept office may be adopted. On this subject reference may be made to No. 197 of these Observations.

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

202. In burghs of regality and barony not being parliamentary burghs, the proceedings to be adopted in the event of failure to elect councillors, or of the election of any councillor being reduced, or declared null, will be determined by the charter or act of parliament by which the burgh has been erected, or under which its affairs are administered. When the charter or act of parliament contains no provision on the subject, the ordinary rules of law will apply, and as to these reference may be made to what has been said in regard to royal burghs which were in the same position previous to the passing of the Act 3 and 4 Will. IV., cap. 76.¹ It must be observed, however, that the Acts 7 Geo. II., cap. 16, and 16 Geo. II., cap. 11,² both applied, and that the Act 3 and 4 Will. IV., cap. 76, applies exclusively to royal burghs, while 3 and 4 Will. IV., cap. 77, applies exclusively to parliamentary burghs. Proceedings for reducing or setting aside elections in burghs of regality and barony must therefore be taken at common law.

3. In Burghs and Places subject to the General Police Act of 1850 or 1862.

203. The Acts of 1850 and 1862 both provide, *first*, that in the event of a vacancy occurring in the place of any of the commissioners or magistrates of police, by

¹ See Nos. 191, 192, and 195 to 199 of these Observations.

² *Stewart v. The Magistrates of Greenock*, 12th July 1853; 15 D., 863; 25 Jurist, 530; 2 Stuart, 530. The Statute Law Revision Act 1867 repealed the former act, except sections 4 and 6 to 8, and the whole of the latter act.

death, refusal to accept, disqualification or resignation, the remaining commissioners may nominate a person duly qualified to supply the vacancy, who shall have the same powers and privileges as the person in whose stead he is nominated, and shall remain in office until the next period of election, when he shall go out of office;¹ and *second*, that if the householders at any time refuse or neglect to elect the whole or any part of the commissioners, the commissioners who held office at the time when such election should have taken place, shall supply the deficiency by such proceedings as are provided for in the case of vacancies by death, refusal to accept, disqualification, or resignation.²

¹ Section 36 of the General Police Act of 1850, and section 55 of the General Police Act of 1862.

² Section 37 of the General Police Act of 1850, and section 56 of the General Police Act of 1862. Reference may be made on this subject to No. 181 of these Observations.

XIV.—SOURCE FROM WHICH EXPENSES AT ELECTIONS ARE PAYABLE.

(1.) In Royal and Parliamentary Burghs.

204. The whole expenses attending the elections of councillors of royal burghs not contained in schedule (F) annexed to the Act 3 and 4 Will. IV., cap. 76, or the making up of the lists of electors,¹ giving notices at the church doors, and providing copies of the lists of electors or parts thereof for the purposes of such elections, are appointed by that act to be defrayed from the common good or other means or revenues of the burgh.²

Section 12 of the same act declared that nothing in the act should be held to affect or apply to the burghs specified in schedule (F), but that the election of councillors and magistrates in all of them should proceed and be conducted in the way and manner practised in them previous to the passing of the act, and as if it had not been passed. Of the nine burghs specified in schedule (F), seven had the number of their councillors and magistrates limited by the Act 15 and 16 Vict., cap. 32, and the elections of the councillors whose numbers were thus fixed were appointed to be made according to the use existing at the time of the passing of the act. The Municipal Elections Amendment (Scotland) Act, 1868, repealed schedule (F) and section 12 of the Act

¹ The provisions of the Act 3 and 4 Will. IV. cap. 76, as to making up lists of electors in royal burghs which send, or contribute to send, a member to Parliament, were superseded by the Burgh Voters Act (19 and 20 Victoria, c. 58), as amended by the Representation of the People (Scotland) Act, 1868. These acts prescribe the manner in which the registers of voters in municipal elections in such burghs are to be made up and the expense thereof defrayed. [See Nos. 8 and 9 of these Observations.] As regards royal burghs which do not send or contribute to send a member to Parliament, the provisions of the Act 3 and 4 Will. IV., cap. 76, are superseded by The Municipal Elections Amendment (Scotland) Act, 1870. [See No. 10 of these Observations.]

² Section 30.

3 and 4 Will. IV., cap. 76, and thus brought the nine burghs specified in the schedule within the operation of the Burgh Reform Act.¹

The act of 1868 further vested the right of electing the town councils of royal burghs which do not send, or contribute to send, a member to parliament in the same class of persons as are entitled to elect the councillors of royal burghs which send or contribute to send a member to Parliament;² and the Municipal Elections Amendment (Scotland) Act, 1870, directed the register of municipal electors in burghs of the former class to be made up and completed in the same manner, and on the same terms, as are prescribed by the Registration Acts.³

The object of the legislation of 1868 and 1870 thus seems to have been to place all royal burghs on the same footing so far as municipal elections are concerned, and to subject them to the provisions of the Burgh Voters Act, which authorise the expenses of preparing the registers of electors under it to be defrayed by assessments for registration purposes, and which provisions are declared by the act of 1870⁴ to be applicable to the costs and expenses of the register of electors prepared in terms thereof.

The act of 1870 further empowers the town councils of all royal burghs, without distinction, from time to time, to resolve that the expenses of the elections of councillors shall be defrayed out of the assessments imposed or levied in each burgh under the provisions and for the purposes of the registration acts; and after such resolution has been adopted, the expenses of these elections, as ascertained and fixed by the town council, are appointed to be added to the expenses of the registration of voters, and to be included in the assessment to be imposed and levied under the registration acts.⁵ The term "registration acts" is declared by the act to mean the Burgh Voters Act (19

¹ Section 3.

⁴ Section 7.

² Section 4.

³ Section 6.

⁵ Section 9.

and 20 Vict. cap. 58), as amended by the Act 31 and 32 Vict., cap. 48, and any other act relating to the registration of persons entitled to vote in the election of members to serve in Parliament for burghs in Scotland which may be in force for the time.¹ None of the Acts thus included in the term "registration acts" applies to burghs which do not send members to Parliament; but inasmuch as the act of 1870 applies the provisions of the Burgh Voters Act to the expenses of the registers of electors made up under it, the legislature appears to have intended that royal burghs which do not return members to Parliament should be entitled to deal with the expenses of municipal elections in the same way as royal burghs which do return members to Parliament, and to provide for them by including them in the registration assessment.

The Ballot Act enacts that all expenses connected with municipal elections under it shall be defrayed in the manner provided by law, with respect to the expenses of municipal elections.²

The cost of municipal elections in royal burghs are thus chargeable against the common good of each burgh, unless the council resolve, as they may do, to charge them against the assessment leviable for the registration of voters in the burgh.

205. The Act 3 and 4 Will. IV., c. 77, appoints all the expenses attending the elections of councillors in parliamentary burghs, or the making up of the register of electors,³ giving notices at the church doors, and providing copies of the register, or parts thereof, for the purposes of such elections to be defrayed from the common good, or other means or revenues of these

¹ Section 2.

² Section 20, sub-section (4).

³ The provisions of the Act 3 and 4 Will. IV., cap. 77, as to making up registers of electors in parliamentary burghs were superseded by the Burgh Voters Act (19 and 20 Victoria, c. 58), as amended by the Representation of the People (Scotland) Act, 1868. [See No. 10 of these Observations.]

burghs.¹ That act, however, made no provision for defraying the necessary expenses of the municipal establishments thereby constituted, and the other expenses attending the administration of the burghs with which it dealt. The Act 10 and 11 Vict., cap. 39, was accordingly passed in 1847 to provide for the necessary requirements of such of these burghs as did not possess any common good or adequate means of defraying their municipal expenditure, and it authorised the magistrates and councils to assess all tenants, occupiers, and possessors of premises within the same valued at £2 or upwards of yearly rent, in an amount not exceeding 3d. in the pound of the yearly rent of such premises, for defraying the expenses of such municipal establishments and administration. The Act of 1847 was repealed by the General Police Act 1850 (13 and 14 Vict., cap. 33),² except only as regarded such burghs as had, previous to 15th July 1850, adopted in whole or in part the powers and provisions of the Act 3 and 4 Will. IV., cap. 46. The Act of 1850, however, substantially re-enacted the provisions of the Act of 1847, but appointed the amount to be "imposed levied and recovered in such and the like manner, from the same descriptions of persons and property, and under the like provisions and exceptions as the assessments leviable" under the Act of 1850 "for other purposes are authorised to be imposed, levied, and recovered by the commissioners."³ The Act of 1850 was in like manner repealed by the General Police and Improvement (Scotland) Act 1862,⁴ except only as regarded any burgh in which its provisions or any part thereof had on or before 1st August 1862 been adopted. But the Act of 1862 empowered the magistrates and councils of parliamentary burghs in which no adequate means existed for defraying the necessary expenses of the burgh to assess all occupiers of premises within it to an amount not exceeding three pence in the pound of the

¹ Section 29.² Section 1.

Section 375.

⁴ Section 1.

yearly rent of such premises, and it appointed such assessment to be "imposed, levied, and recovered in such and the like manner, from the same descriptions of persons and property, and under the like provisions and exceptions as the police assessment leviable under the provisions of any local Act," or of the General Police Act of 1850 if in force in such burgh, or under the General Police Act of 1862 "is authorised to be imposed, levied and recovered by the commissioners."¹ The Municipal Elections Amendment (Scotland) Act, 1870, farther empowered the town councils of parliamentary burghs to add the expenses of the elections of councillors, or of any trustees, commissioners, or other persons who are appointed, or have been in use to be elected along with the councillors, to the expenses attending the making up of the registers of electors, and to include the same in the annual assessment for registration of voters.² The Ballot Act, 1872, appoints all expenses of municipal elections under it to be defrayed in manner provided by law with respect thereto.³

The costs of elections in parliamentary burghs are thus chargeable against the common good of each burgh, or, if there be no common good in any such burgh, against the assessments leviable under the Act 10 and 11 Vict., cap. 39, or under the 375th section of the General Police Act of 1850, or under the 439th clause of the General Police Act of 1862, in so far as any of these acts applies to the burgh, unless the town council resolve, as they may do in all parliamentary burghs, to charge them against the registration assessment.

2. In Burghs of Regality and Barony not being Parliamentary Burghs.

206. In burghs of regality and barony not being parliamentary burghs, the expenses connected with the preparation of the lists of electors, and with the election

¹ Section 439.

² Section 9.

³ Section 20, sub-section (4).

of councillors, magistrates, and office-bearers must be defrayed out of the funds pointed out by the charter or act of parliament by which the burgh has been erected, or under which its affairs are administered. When the charter or act of parliament contains no provision on the subject, these expenses must be met as part of the ordinary charges attending the administration of the burgh, and charged against the common good, or other revenues available for the purpose.

3. In Burghs and Places subject to the General Police Act of 1850 or 1862.

207. The reasonable charges and expenses incurred in connection with the first election of commissioners are appointed by the act of 1850 to be paid "out of the money assessed and levied under the authority of the act,"¹ and by the act of 1862 "out of the police assessment levied under the authority of the act."² Neither act contains any special provision as to the payment of the expenses of subsequent elections, but there can be no doubt that such expenses in burghs and places subject to the act of 1850 form a proper charge against the general assessment authorised to be levied by that act,³ and in burghs and places subject to the act of 1862, against the police assessment leviable under that act.⁴

¹ Section 30 of the General Police Act of 1850.

² Section 47 of the General Police Act of 1862.

³ Section 63 of the General Police Act of 1850.

⁴ Section 84 of the General Police Act of 1862.

XV.—MISCELLANEOUS RIGHTS, DUTIES, AND LIABILITIES OF MAGISTRATES, COUNCILLORS, AND COMMISSIONERS OF POLICE.

1. In Royal Burghs.

208. The magistrates, councillors, and office-bearers of every royal burgh, elected under the provisions of the Act 3 and 4 Will. IV., cap. 76, stand, in all respects, in relation to the administration of the affairs and property of the burgh, or of property under its care and management, in the same situation in which they stood previous to the passing of that act. They have also the like jurisdiction and the same rights and powers of administration of the property and affairs of the burgh, and of making all usual and necessary appointments, as previously lawfully belonged to and were exercised by their predecessors in office,—anything in the set, usage, or custom of the burgh to the contrary notwithstanding.¹

209. No councillor or magistrate of a royal burgh, elected and accepting under the provisions of the Act 3 and 4 Will. IV., cap. 76, incurs, by such election or acceptance, any other responsibility for the debts of the burgh or the acts of his predecessors in office than might have attached to him as a burgess or inhabitant, independently of such election.²

210. No misnomer or inaccurate description of any person or place in any writing made in the form of any schedule to the Act 3 and 4 Will. IV., cap. 76, or in any list or register, or notice, or other writing made under the authority of that act, in any way prevents or abridges the operation of the act, provided the person or place is

¹ Section 31 of 3 and 4 Will. IV., cap. 76.

² Section 33 of 3 and 4 Will. IV., cap. 76.

so designated in such writing, list, register, or notice as to be commonly understood.¹

211. Since the passing of the Act 3 and 4 Will. IV., cap. 76, the oath termed the Burgher Oath cannot be required to be taken in any burgh.²

212. The Act 3 and 4 Will. IV., cap. 76, contains no provision as to the mode of electing the town clerks of royal burghs, or as to their tenure of office. These matters are left to be regulated by the common law. Various decisions of the Courts, however, illustrate, on the one hand, the powers of the town council as to electing and controlling the town-clerk, and on the other, the rights and responsibilities of that officer.

(1.) These decisions seem to show (*a*) that, while the magistrates and councillors are the patrons of the office, the election to which must be conducted in the same way as the election to any other office, they cannot attach to it conditions inconsistent with its independence; and (*b*) that the town-clerk of a royal burgh, once duly elected, holds his office *ad vitam aut culpam*, and cannot be removed save on just cause, even though the terms of his appointment bear that it is during pleasure,³ or for a period of years, and these

¹ Section 35 of 3 and 4 Will. IV., cap. 76.

² Section 36 of 3 and 4 Will. IV., cap. 76.

³ *Simpson v. Tod*, 17th June 1824, 3 S., 150 (N.E., 102). In this case Simpson, who had been elected town-clerk of Pittenweem in 1821, "during the pleasure of the council," brought an action of reduction of certain resolutions of the town-council depriving him of his office, and electing Conolly in his place, and concluding for damages. The Lord Ordinary (Eldin) decerned in terms of the reductive conclusions, found that Simpson had the only good right to the office of clerk, and appointed him to give in a condescendence of his claim of damage. The Court adhered; and it was observed by the Lord President (Hope), and concurred in by the other judges, "that it was inconsistent with law to elect a town-clerk during pleasure; that he was a public officer, entrusted with the performance of important public duties; and that he ought not to be under the apprehension that he was liable to be dismissed at the pleasure, or perhaps the caprice, of the town council."

have expired.¹ Whatever be the terms of his appointment, he certainly cannot be deprived of his office by the

¹ *Farish v. Magistrates of Annan*, 22d November 1836, 15 S., 107; 12 F., 115; aff. 14th July 1837, 2 S. & M'L., 930. In this case Foot and Farish were elected conjunct town-clerks of Annan for the space of five years. On the expiry of that period, the council elected Foot to be senior town-clerk, and Underwood to be junior town-clerk. In a suspension and interdict at the instance of Farish, the Court found that he was not summarily removable, and interdicted the council from carrying the appointment of Underwood into effect, reserving to the Council to try in an action of declarator whether the right of Farish to the office terminated by the lapse of the stipulated period. The Lord Ordinary (Moncreiff) granted the interdict "in respect of the express judgment in the case of *Simpson v. Tod*, . . . and in respect that that judgment, which was pronounced with great deliberation, appears to the Lord Ordinary to be in conformity to what he had always understood to be a general principle in the law of Scotland." A note to his judgment contains the following statement of his views:—"The Lord Ordinary is clearly of opinion that there is no material difference in regard to a possessory question of this kind, between an appointment of a clerk nominally for *one year*, or for *five years*, or *during pleasure*. If there be any distinction, the power of arbitrary removal is clearest in the last case. But still the principle of law, indicated throughout all our books, that a town-clerk of a royal burgh, as a *public officer*, holds generally his office for life, and that it must lie with those who think that there is an arbitrary power of removing him in any particular case, to show this in a proper process of declarator, was very fully established in the case of *Simpson*, referred to in the interlocutor. It is said that that decision is of little weight, and the respondents endeavour to explain it away. The Lord Ordinary does not know *why* it should be of little weight, being the judgment of the Supreme Court in a matter of pure Scotch law. It was very carefully considered. The Lord Ordinary knew it well at the time, and has minutely examined the papers in it. . . . Having this opinion on the state of the question as presented in the suspension, the Lord Ordinary does not think that it is necessary to enter into the general argument as to the power of the magistrates to remove the suspender. He has understood it to be clear law in general, that a town-clerk of a royal burgh is *not* a mere servant of the town council, but a *public officer*, having very important duties to the community, and even to the State, to discharge, in which he *must* hold himself as entirely independent of the town council. In consequence of this, the general law is, that it is a life office. Accordingly, *it did not fall, whatever were the terms of the appointment, even by the disfranchisement of the corporation of the burgh*, under the old rules. The respondents have argued in this case that because the term of the appointment was limited to five years, the office ceased, *ipso facto*, when the period expired, and a new appointment became essential. But, if this were sound, the consequence would be very serious; for if the council had dismissed the suspender, *and appointed no clerk in his place*, it would follow that the burgh might have ceased to have a clerk altogether, and the public franchises of the people, as well as the most important interests of the Crown, the corporation, and the burghage heritors, have been defeated, or essentially impaired.

magistrates and council summarily, and without process of law.¹

¹ Simpson v. Tod, and Farish v. Magistrates of Annan, *ut supra*.

The Lord Ordinary thinks, that, from the nature of the office, it could not expire, *ipso facto*, under any terms of the appointment, which raises at once the peculiarity in principle, whereby the possessory question seems to him to be ruled. The Lord Ordinary has also one observation to make on the statute of 3 and 4 Will. IV., cap. 77. It seems to him that the 26th section of that act distinctly recognises the previously *understood law of Scotland* on this point. It provides 'that it *shall* be *lawful* for the magistrates and council of any such burgh or town to elect a town-clerk, for such burgh or town, *for one year*.' Why make this provision that it *shall be lawful* so to do, if it had not been well known that the previous law held a principle *opposed to the legality* of such a limitation? At least, with such a provision in the statute book, it must be difficult to say that there was no previous law on the subject, or that the case of Simpson was of no authority. But the clause goes on more materially to touch this *possessory question*. 'Without prejudice to his re-election, and also without prejudice to the lawful right of any existing town-clerk in any such burgh or town, to hold his office of town-clerk, or clerk to the magistrates and council, *ad vitam aut culpam*.' The Lord Ordinary does not say that this determines that, in any particular case, the clerk must hold his office *ad vitam aut culpam*. But it most manifestly *supposes* that there may be cases in which, notwithstanding an appointment for *one year* (or for *five years*) only now declared to be *lawful*, the clerk may be entitled to hold the office *ad vitam aut culpam*. It leaves it as a case to be tried and determined according to the usage and circumstances, but with the strongest implication that *till a special case be shown*, the general law previously was against the legality of such an appointment." [But see on this point the note by the Lord Ordinary (Jeffrey) in Dykes v. The Magistrates of Port-Glasgow, quoted in footnote to No. 225 of these Observations]. Lord Medwyn observed, "In Tod's case, though the appointment was during pleasure, I cannot think it very different from this, and if that case can only be got rid of by holding that 'during pleasure' is not 'during pleasure,' I do not think it can be got over. It seems to me to rest in the nature of the office. The town-clerk is not the servant of the magistrates, but an officer of the town, analogous to that of sheriff-clerk, and at present I incline to hold the adjection of any condition is illegal, and that this cannot be distinguished from the case of Tod." The Lord Justice-Clerk (Boyle) said, "I do not wish to anticipate anything in the declarator, but we have solid grounds in the case of Tod v. Simpson, and other cases, for viewing the suspender (Farish) as holding a public office from which he cannot be arbitrarily removed, and that he is not to be turned out without process at law. I do not see the difference attempted to be made out between an appointment during pleasure and for a limited term, and therefore I am for maintaining the suspender in possession, leaving the magistrates to bring the declarator."

On appeal, the House of Lords, on 14th July 1837, held that the only question raised in the case related to the possessory title of Farish, and affirmed the judgment of the Court below in regard to it. But to pre-

(2.) When the office of town-clerk is held by one or more individuals who are able and willing to perform its

vent their judgment from being construed into a final decision upon the nature and tenure of the office of town-clerk generally, they altered the interlocutor by leaving out the words referring to the case of *Simpson v. Tod*, and the finding that Farish as a public officer could not be removed summarily. In reference to that alteration, Lord Brougham, in moving the judgment of the House, observed,—“This alteration, however, must be distinctly understood as not intimating the least opinion against the views taken by any branch of the Court below of the case of *Simpson v. Tod*, much less as impugning the authority of the decision on the declarator in that case. Your Lordships merely leave the question open and confine your judgment of affirmance to the possessory right merely, the only proper subject of the judgment below, and the alteration made in the interlocutor is solely with the view of preventing this affirmance from appearing to conclude the other question.”

Morrison v. Magistrates of Greenock, 27th May 1806, referred to in *Dykes v. Magistrates of Port-Glasgow*, 2d July 1840, 2 D., 1274; 15 F., 1388. In *Morrison's* case, as referred to by Lord Moncreiff, “it was laid down that in the case of royal burghs a town-clerk was to be held as appointed for life, when there was nothing express as to the duration of the appointment.”

The views entertained by eminent lawyers as to the office of town-clerk in royal burghs may be gathered from the following opinions obtained by the Town Council of Glasgow at different times,—

In April 1834, Mr. Andrew Skene, advocate, and Mr. Rutherford (afterwards Lord Rutherford) said,—“Looking on the one hand to the nature of the duties discharged by the clerks, which are, many of them, almost, if not entirely, judicial, and to a broad constitutional principle that officers charged with such functions should not be removable at pleasure, especially where they derived their appointment from an elective and varying magistracy, we conceive that the Court would not sustain as legal any appointment short of an appointment *ad vitam aut culpam*. The opinions of the Court expressed in similar cases, not so strong even as those of town-clerks, but turning upon similar principles, justify the view we have now taken, and would lead, we apprehend, to that result. The Court would not proceed upon a matter of mere expediency in the particular case, but they would apply to an appointment connected with the constitution of the country those principles which have been adopted to ensure independence and impartiality in the discharge of such duties. They would be much disposed, also, looking to the circumstance that the individual was withdrawn from his profession and ordinary occupations to fill the situation, and that in fact he was generally re-elected, to consider his re-election as a matter of form rather than of substance, and that his office was really conferred during life or fault, notwithstanding this annual acknowledgment of the party on whom it was bestowed. Though the form of election must be gone through, we think they would be inclined to hold that the magistrates were bound to re-elect, and there are not wanting analogous cases of the existence of an obligation where the act of the obligant is voluntary in its mode and form. . . . We do not think there can be much doubt that the appointment *ad vitam aut culpam* is with reference to such an officer as

duties, the town council cannot, without the consent of the holder, or holders, appoint an additional town-clerk.¹

the clerk of court and assessor of the magistrates the only proper and expedient appointment. It would probably be found to be the only legal appointment."

In February 1859, the then Lord Advocate (Baillie, afterwards Lord Jerviswoode), the Dean of Faculty (Moncreiff, now Lord Justice-Clerk), and Mr. Young (now Lord Young) said,—“ We are of opinion that Mr. Monro has been validly appointed to the office of town-clerk, and that he may maintain his appointment while he repudiates any of the conditions referred to in the minute which shall appear to be illegal and *ultra vires* of the memorialists to impose as conditions of the appointment. The memorialists are the patrons of the office of town-clerk, but have not as such or otherwise any right to interfere with the fees and emoluments which are by law attached to the office. The office may be held by more than one person as it has hitherto been in Glasgow ; but the whole fees and emoluments of the office must be paid to those who hold it, and cannot lawfully be applied to any other purpose whatever.”

In November 1859, the Attorney-General (Sir Richard Bethell, afterwards Lord Westbury) and Mr. T. H. Lloyd said,—“(1) We are of opinion that the appointment of Mr. Monro to the office of town-clerk is a valid and indefeasible appointment, entitling him to a joint tenure of the office with Mr. Turner, and that it comes as an appointment *ad vitam aut culpam*. Any attempt to annul the appointment would be ineffectual ; and having regard to the serious consequences which would result from impeaching its validity, it would, in our opinion, be most inexpedient that any such question should be raised. (2) We are also of opinion that Mr. Monro is entitled to hold the office and participate in its emoluments freed from the conditions set forth in the minute of council as to the appropriation of fees, and the control and management of the office. The conditions so sought to be imposed were, if not illegal, at all events *ultra vires* ; and the rule of law in England, as well as in Scotland is, that if to an act competently done conditions are annexed which the one party has no power to exact, and the other party is not bound to observe, the act stands good, and the conditions are rejected. . . . (4) We are of opinion that a bill seeking to disturb, without their consent, the legal status and rights of the existing holders of the office of town-clerk, would not, as to so much of it, receive the sanction of Parliament. The objection to it would be unanswerable. Either the parties hold their office by a legal title, or they do not. If they hold the office by a legal title, the legislature will not, by an *ex post facto* law, disturb the status and rights which belong to it. If it be not lawfully held, or be held by a questionable title, the courts of law, and not the legislature, must deal with the case.”

See also Observations by Lord Rutherford Clark as to the office in *Wright v. The Police Commissioners of Lockerbie*, quoted in footnote to No. 244 of these Observations.

¹ In 1864 the Town Council of Glasgow consulted the then Lord Advocate and Dean of Faculty (Lord Moncreiff), Mr. E. S. Gordon (now Lord Gordon of Drumearn), and Mr. John Millar (now Lord Craighill), as to whether they could appoint a third town-clerk, with

Even when the office has been held by two persons under an appointment of both "to be conjunct common clerks in terms of law," and one has died, but the other is able and willing to perform the whole duties, it seems to be incompetent for the town council, without the consent of the survivor, to appoint a second town-clerk.¹

(3.) It has been questioned whether a town council can competently appoint an interim clerk even for the purpose of officiating in matters relative to which the town-clerk cannot act.²

(4.) When from any cause it is necessary to appoint an interim-clerk to perform duties which the town-clerk cannot perform; or when, on the occasion of a vacancy in the office, a town council is prevented from proceeding

right to a share of the emoluments of the office; and, whether the *onus* would rest upon them of showing that the then town-clerks could not, or did not, efficiently perform the duties of the office. The opinion was as follows:—"We think that the memorialists could not, in the present circumstances, legally appoint a third town-clerk."

¹ Upon this question Mr. A. R. Clark (Lord Rutherford Clark), then Solicitor-General, gave the following opinion in 1872:—"I am of opinion that the memorialist [the surviving town-clerk] is entitled to the office of town-clerk, and that it is incompetent to appoint another to be conjoined with him in the office. I regard the appointment of the memorialist and [A.] [the deceased town-clerk] as an appointment of both and each to the office of clerk, and that on the death of A. the entire office vested in the memorialist. . . . I am of opinion that the memorialist is entitled to all the rights and privileges of town-clerk, within which is included the custody of the records and documents belonging to the burgh."

² *Duff v. The Magistrates of Elgin*, 16th January 1823, 2 S., 117 (N.E., 109). In this case the town-clerk of Elgin having succeeded to heritable property within the burgh, applied to the Court to authorise and ordain the magistrates to appoint the sheriff-clerk of the shire of Elgin, or any other notary public, upon the petitioner's application, to execute the office of town-clerk of that burgh *pro hac vice* in taking all necessary infestments in favour of the petitioner, &c. The Court granted warrant as prayed for to the sheriff-clerk, which was extracted. Of this the magistrates complained, on the grounds (1) that they had the sole right of nomination; (2) that the warrant was incompetent, as being beyond the *nobile officium* of the Court; and (3) that it was too broad. They did not, however, pray for a recall of the warrant. The Court dismissed the complaint; but the Lord President (Hope) observed that, out of respect to the magistrates, the town-clerk should have applied to them to sanction his petition. He added, "I cannot say that he was not entitled to apply to us for authority."

to elect a town-clerk permanently, the safe course is to apply to the Court of Session, who will make an interim appointment if proper cause be shown.¹ But when

¹ Duff v. The Magistrates of Elgin, *supra*.

The Magistrates of Forfar v. Adam, 14th May 1822, 1 S., 376. In this case the magistrates granted a commission to James Walker and James Adam, and the survivor of them, for life, of the office of town-clerk. Walker died in 1815, and the magistrates raised an action of declarator to have it found—(1) that in respect of incapacity to perform the duties, the commission in favour of Adam was null *ab initio*; or (2) that, at least, he had no power to appoint a deputy except by their consent. The Lord Ordinary (Pitmilley) found that, “in respect of the terms of the commission, the pursuers have no right to remove the defender, without his consent, on the grounds stated in the libel and condescendence, from the office which their predecessors conferred on him during his life; and that he is entitled to appoint a deputy, for whom he must be answerable, and whom the pursuers, who do not insist that the defender shall perform the duties of the office personally, must receive, provided such deputy is fit and qualified to discharge the duties of the appointment,” and assoilzied the defender. But the Court recalled this interlocutor, allowed a proof of the condescendence before answer; and on its being reported (in consequence of a recommendation from the Bench), the two senior counsel, by authority of the parties, framed a minute of agreement by which it was arranged—(1) that Adam should be continued in his office; (2) that the magistrates should have power to name a deputy, and remove him at pleasure; and (3) that Adam should draw three-fourths and the deputy the other fourth of the emoluments; and the Court decerned in terms of the minute. During the dependence of the case the procurators of Forfar applied to the Court to appoint an interim town-clerk, and the magistrates concurred with them in recommending Hunter, who was accordingly appointed by the Court, reserving to Adam to claim the whole dues and emoluments of that office from Hunter in case he shall be found to have a right thereto.

After the decision in the case, the Court, on the petition of Adam, recalled Hunter's appointment, and found Adam entitled to three-fourth parts of the whole fees and emoluments properly belonging to the office of town-clerk of Forfar, received by the respondent during the time of his acting as interim-clerk, with interest thereon at 4 per cent., reserving to Hunter to claim from the magistrates and town of Forfar his claims for relief for expenses, and also for what further allowance may seem due to him from them, and to the magistrates and town their defences as accords. [7 March 1823, 2 S., 281 (N.E., 248).]

Tait, 20th June 1848, 10 D., 1365; 20 Jur., 476. In this case infetment in burgage subjects had to be given to the wife of a town-clerk, and the Court authorised the sheriff-clerk depute of the county in which the burgh was situated to act as town-clerk to the effect of expediting and recording the necessary infetments.

Magistrates of Newburgh, 29th November 1864, 3 Macph., 127; 37 Jur., 68. In this case an interim town-clerk was appointed by the Court, during the incapacity of the town-clerk, on the petition of the magistrates.

proceedings are in dependence in reference to the office, as possessed and exercised by one having a *prima facie* title to it, the Court will not interfere with the actual possessor.¹

(5.) The town-clerk is the proper and responsible custodier of the charters, records, and papers of the burgh; and if the magistrates and council, or any of them, take or retain possession of these documents and records, they will be found personally liable for the expenses to which the town-clerk may be put in vindicating his rights.²

¹ *Magistrates of Annan v. Farish*, 5th December 1835, 14 S., 111; 2 Sh. & M.L., 930. In this case, to which reference has already been made, a person had been elected for a period of years to the office of junior conjunct town-clerk, and on the death of his colleague, after the expiry of the period, another person was elected clerk, who, with the town council, presented a petition and complaint against the junior clerk, praying to have free access to and use of the burgh books in his possession; the Court held that as the junior clerk was willing to discharge the duties of his office, the petition by the magistrates was unnecessary, and, as regarded the person newly elected, incompetent.

² *Spence v. Cunninghame*, and *Cunninghame v. The Magistrates and Council of Linlithgow*, 6th July 1830, 8 S., 1015; *Boyd v. Cunningham*, 20th November 1832, 11 S., 58. For some years previous to 1830 the records of the burgh of Linlithgow had, conformably to an act of council, been deposited in a room, the key of which was held, not by the town-clerk, but by two members of the council. The town-clerk was thus unable to allow inspection of the minutes, or to grant extracts which were demanded from him. He applied to the council to be allowed the custody of the records as his legal right, but without effect. In these circumstances, and a petition and complaint to the Court of Session having been presented against him for his failure to give the extracts, he presented a petition and complaint against the provost and other members of council, praying to have the custody of the records delivered to him, and also to have the persons complained on found liable in expenses. Answers to the petition of the town-clerk were lodged in name of the provost and magistrates; but at the first meeting of council thereafter an absolute majority of the council disclaimed opposition to the petition. In July 1830, the Court sustained the complaint by the town-clerk, found that as clerk of the royal burgh of Linlithgow he "is the legal and proper custodier of the records of the council of the burgh; that he is entitled to demand and take possession of these records, and give forth extracts thereof according to law." He was also found entitled to the expenses of his own complaint, and to be relieved by the respondents of those incurred in the complaint against him, reserving to them their relief *inter se* in relation to the disclamation. The provost was thereafter charged as personally liable for the taxed expenses, but he suspended, and pleaded that the burgh funds alone were liable. He was, however, held personally responsible.

Finnie v. M'Intosh, 15th July 1868, 6 Macph., 1066; 40 Jur., 601. In

(6.) But his independence carries with it corresponding responsibilities. He is bound to furnish extracts from the records to all persons showing a proper public interest; and his failure to do so will subject him personally to complaint and claims of damage.¹ These extracts must be full extracts of the proceedings of the town council, and not merely such as he may consider necessary.² But when the avowed object of requiring extracts is for a private purpose, and to aid one of the parties in a lawsuit, the clerk may be justified in declining to give them.³ A town-clerk cannot be required by a litigant to produce the burgh court books in

this case the town-clerk of Fortrose presented a petition and complaint against the provost and magistrates, setting forth that they had deprived him of the custody of the records and documents of the burgh. The Court granted the prayer of the petition; and, in doing so, the Lord President observed that the decision of the case did not admit of any doubt. "It matters very little," he said, "what the books and papers were. It must be assumed, as was indeed conceded, that they were in the lawful custody of the town-clerk for the time being. They were then forcibly taken from him, and it appears to me that in such a case, independently of the relation which subsisted between the petitioner and respondents, that the maxim applies—*spoliatus ante omnia restitutus*. But when I look at that relation, the proceedings appear to me to be wholly unjustifiable. These gentlemen must have known, or at least ought to have known, that the town-clerk as a public officer has the custody of the burgh records and papers entirely independent of the town council, except in so far as might be necessary to give access for legitimate purposes. The custody is with the town-clerk and no one else, and he is responsible to the burgh and to this Court for that custody. No man is entitled to interfere, directly or indirectly, with his custody of these books. We must therefore pronounce an interlocutor ordaining them forthwith to be delivered to him." Lords Deas and Ardmillan concurred.

¹ *Tod v. Conolly*, 17 June 1824, 3 S., 153 (N.E., 103); *Fotheringham v. Williamson*, 9 March 1838, 16 S., 904; 13 F., 641. In *Tod's* case the town-clerk of Pittenweem declined to give extracts from the records to enable a party to complain against an election of magistrates. A complaint was presented to the Court of Session against him, and immediately on service of it he gave the extracts. The Court, nevertheless, found him liable in expenses. In *Spence v. Cunninghame*, 6th July 1830, 8 S., 1015, the town-clerk of Linlithgow was found liable in expenses, though his failure arose from the refusal of the magistrates and council to give him possession of the records; but he was found entitled to relief against those who had illegally retained the records.

² *Gardiner v. Conolly*, 11 Dec. 1823, 2 S. 571 (N.E., 492).

³ *Fotheringham v. Williamson*, *ut supra*.

process; but the litigant is entitled to inspect them and obtain extracts therefrom.¹ In all cases, however, in which the town-clerk has not good reason to apprehend that the public interest would suffer by giving access to the records, and furnishing extracts, it is the prudent and proper course for him to give such access, and to furnish whatever extracts may be required.

(7.) When a town-clerk has been provided with chambers in the town-house of the burgh, to enable him to execute his public duties, it is incompetent for the magistrates to proceed, as in a removing within burgh, to deprive him of part of the accommodation he has been in use to occupy, by chalking the door, and bringing a summons of removing before the sheriff.²

(8.) When a town-hall was erected partly by public subscription, and partly by funds contributed by the town council, on a site given by the council, with a view to accommodation being provided for all the purposes

¹ *Campbell v. Black*, 6 July 1813, 17 F.C., 424. In this case General Campbell applied to the Court to ordain the town-clerk of Dunfermline to produce in process, or at least in the hands of the clerk to the process, the burgh court books of Dunfermline. The town-clerk objected to the demand; and the Court being of opinion that these books were a record which was by law kept at Dunfermline, and that parties who wished to examine them were bound and entitled to inspect them there, refused the application.

² *Magistrates of Dundee v. Kerr*, 6 December 1833, 12 S., 173; 9 F., 124. In the note to his interlocutor dismissing the action, which was affirmed by the Court of Session, the sheriff expressed an opinion that if the arrangements under which the clerk occupied the apartments or chambers could be set aside, "that object can only competently be sought for under the form of a declarator and reduction of the defender's rights to the extent which may be insisted for." He added, "*Ex facie* of the grant of the office, as explained by what took place on occasions of former appointments, the clerk was entitled to the use of certain apartments or chambers, to be held by him during life as part and pertinent of his appointment. Is it competent for the sheriff to sanction the magistrates recalling at their own pleasure, on a ground of expediency or economy, what was unqualifiedly bestowed on another for life? Or, can he competently decide between them to what extent the defender shall have accommodation, supposing the magistrates may now inquire into the extent of the accommodation which ought to be afforded to him? The form, at least, of the present action will not warrant his doing so."

of the burgh, and the plans referred to offices for the town-clerk, it was held that the town-clerk was entitled to the use of these offices, so long as he remained town-clerk, and that the council were not entitled to withhold these offices from him.¹

(9.) When a town-clerk has committed a fault, the Court will not interfere to prevent the town council from depriving him of his office, provided the fault be one of "knowledge and importance," as distinguished from one of "mere omission."²

(10.) The town-clerk cannot, at common law, at the same time hold office as such, and also as a magistrate or councillor.³ This incapacity is made statutory by 3 and 4 Will. IV., cap. 76, section 28 of which enacts

¹ *Downie v. Nicholson and Others*, Magistrates of Annan, 12th July 1878. In the note to his interlocutor in this case, Lord Rutherford Clark said,—“It appears to the Lord Ordinary that the object in view was to erect a building which should provide accommodation for all the purposes of the burgh. This was what the community desired, and the town council acceded to their wish. It was due to this joint action that the town hall was erected, and it seems to the Lord Ordinary that the town council are not entitled to alter the scheme which was thus carried into completion, or to withhold from the town-clerk the benefit which was intended for him. They do not allege that the rooms in question are required for any other purpose of the burgh. It was urged that the town council were entitled to charge a rent for the use of the rooms. But in the opinion of the Lord Ordinary, this would be inconsistent with the conditions on which the hall was built. He thinks that the purpose was to provide accommodation for the clerk, of which he should enjoy the use in his capacity of a public officer.” The interlocutor has been reclaimed against.

² *Sir William Thomson v. The Town of Edinburgh*, 14th February 1665, Mor., 13,090. In this case the town-clerk sought to have the act of deposition reduced, on the ground that the punishment was incommensurate with the fault, and that no real damage had resulted. The Court, however, repelled the reason of reduction, and found the sentence not to be unjust—the fault being of “knowledge and importance;” but found that if it could be proved that the fault “was not of knowledge, but of mere omission incident to any person of the greatest diligence, they would not find that a sufficient ground to depose him.”

³ *Munro, etc., v. Forbes, etc.*, 21 July 1784; aff. 3 May 1785, 3 Paton's Appeals, 23. The principle that a town-clerk is not a magistrate was given effect to in the case of *Drumlanrig*, 15 January 1624, Mor. 13089 and 2509, where a charge to the town-clerk along with the magistrates, to perform the town's obligations, was suspended as against the clerk, but sustained as against the magistrates.

that no councillor, nor the partner in business of any councillor, can hold the office of town-clerk. The clerk of a burgh court and his deputies cannot act either directly or indirectly as procurators of that court.¹

(11.) The case of *Forbes v. The Magistrates of Banff*, 23d February and 8th July 1856,² is instructive, as laying down principles for distinguishing the business which falls upon a town-clerk in the discharge of his proper official functions, and is covered by his official salary, from extra-official work, for which he is entitled to professional remuneration.

¹ Act of Sederunt, 12 November 1825, Part II., cap. 6, section 2. See *A. v. B.*, 14 February 1740, 5 Brown's Sup., p. 693. See also Act of Sederunt, 10th July 1839, section 160. In the case of *Sellar v. Duff and Bain*, 11 February 1809, 15 F. C., 181, a sheriff-clerk, who was also commissary-clerk and clerk in the burgh court of Elgin, was suspended from his office of sheriff-clerk for the space of two months, and his depute was fined in the sum of £20 sterling for having acted as agents before the sheriff and commissary courts of Elgin, and the burgh court of Elgin. Any judicial proceedings in which the clerk acts as agent will be invalid, even though the opposite party should consent to waive the objection, for private consent cannot sanction what the public law declares to be unlawful; *Smith v. Robertson*, 27 June 1827, 5 S., 848. The clerk cannot be pursuer in his own court—*Campbell v. M'Cowan*, 10 July 1824, 3 S., 173; *Macfarlane v. A. B. (Campbell)*, 6 March 1827, 5 S., 537 (N.E., 504); affirmed 8 April 1830, 4 W. & S., 123; nor can he act as clerk in suits in which he has a personal interest. *Manson v. Smith*, 8 February 1871, 9 M.; or 492, 43 Jur., 261; *Macbeth v. James*, 8 February 1873, 11 Macph. 404. The principle which has ruled all the cases is that impartiality in a clerk of court is no less necessary than in a judge. "The proceedings to which such an objection can be stated are null and void, as illegal and unconstitutional. The pure administration of judicial tribunals is held to require the stringent enforcement of this rule, to the extent even of setting aside the whole proceedings. It was contended that this was hard for the clients, but the Court said clients should not employ clerks of court as their agents, and the observation has certainly no force in this case, for the clerk here was his own client, and prosecuted his own case;" per Lord Moncreiff, in *causa Smith v. Manson*, *ut sup.* Lord Neaves said in the same case,—“There can be no security for the truth or accuracy of a decree, the terms and form of which may be moulded by the act of an interested party.”

² 18 D., 645, 1210; 28 Jur., 278, 612. In this case a town-clerk appointed “*ad vitam aut culpam*, with all the powers, privileges, and duties, and with the like emoluments of his predecessor,” with an official salary of £8, 6s. 8d. per annum, was held entitled to charge the burgh

(11.) No other officer of a royal burgh occupies at common law a position similar to that of the town-clerk ; and

as for extra-official work for (1) trouble connected with the appointment of teachers for the grammar school ; (2) for furnishing extracts of the minutes of council and head court ; and (3) for making returns to Parliament as to the police of the burgh, and as to the voters, in compliance with a requisition addressed by the Crown Office to him as town-clerk and the official organ of the corporation. In deciding this case, the Lord President (M'Neill) said,—“ A large proportion of the things charged for is what he is entitled to be paid for if he performs the work in the service of the burgh. Some of these things charged for he could not claim the right to do as town-clerk. Any other professional person could have done them. It may be very convenient for the magistrates that he should do them, for he is always at hand, and is in possession of the burgh documents, but still I do not think he could claim the right to do all of them if the magistrates chose to ask any other person to do them. I shall not say which these are, for that might raise questions between the parties. I only say this generally.” Lord Ivory said, — “ The difficulty here arises from mixing together two things very different from each other, those duties properly falling within the official department of town-clerk, and those arising from a species of agency which is accidentally attached to the holder of the office by a sort of tacit arrangement. All we can do at present is to settle a general principle ; the rest will fall under the audit, or the parties must support specific objections to each charge. In point of principle, the pursuer's nomination, and the terms in which his appointment is made, seem to me to result very much into the whole case. It is given *ad vitam aut culpam*, and the minute of the town council bears that the office, and the only office given him, is the corporate office, ‘ with all the powers, privileges, and duties, and with the like emoluments under which the office of town-clerk was held by the deceased William Reid.’ The duties and privileges there spoken of are those attaching to the office of town-clerk. They apply to nothing which the mere conferring of the office would not convey. He is to have the exclusive privilege of the office of town-clerk—that is, to do all the duties which belong to that particular department. If he refuses to do them, the magistrates and town council can compel him to perform them. If he insist upon doing them, and they are disposed to resist, he can overpower that resistance ; but if they will not let him perform them, he is, at all events, entitled to the emoluments. He is corporate clerk. He must do what the corporate body orders him to do, but not extra official duties which any other person, equally with the town-clerk, might perform ; and which any other professional person might be called on to perform. All these extra official affairs fall within the agency I have alluded to. The corporate clerk must attend the meetings of the corporation. He must keep the books, attend the burgh court, write out the judgments, and do the other duties belonging to this office ; but when called on in the administration of the affairs of the burgh to act as notary or agent, a duty which any one else might perform, that is out of the official department, and he then becomes the agent for the burgh. If the magistrates think he is exceeding his duty, and running into excess of expense or otherwise, they can prevent him. That is a difficulty which it is in their own hands to cure,

it has been held that the magistrates and council are not entitled, contrary to former practice, to elect a chamberlain *ad vitam aut culpam*.¹

but in the discharge of the duties of town-clerk no difficulty can arise. I am prepared to hold, so far as I can look into these objections, that very few of the things charged for, if any, will turn out to be exclusively duties of town-clerk. I do not think the pursuer could have insisted on writing out these bonds and leases, or writing out these advertisements, etc. He must have attended the meetings for the election of town councillors. But in other respects he is just the agent of the burgh, and the duties so performed by him are non-official duties, which must be paid for as such." Lord Curriehill said,—“Certainly we cannot make ourselves auditors of these accounts. All we can do is to lay down some principle, which will guide the auditor in adjusting the account. I think there is no difficulty in stating what that general principle should be. It is just where your lordships have both stated it. This pursuer is the public officer of the burgh court, he holds a public office, and there are certain duties which are attached to that office. Now, generally speaking, the measure of these duties admits of very clear criteria. On the one hand, there are duties which he can be compelled to perform, and, if he fail to perform them, he is guilty of malversation of office. On the other hand, there are duties of which he can claim performance. He has the exclusive right of performing them, and may object to any other person performing them. These are very clear criteria, generally speaking, for determining the duties for which he obtains payment of a salary. So far it is clear that he is bound to attend all the meetings of the town council in its corporate capacity, and to write out the minutes, and keep the records of the town council; and, in the same manner, he must attend as clerk of the burgh court when the bailies are performing their judicial functions as judges of that court, and must write out their judgments. I do not think it is part of his duty that he can insist on performing, or be compelled to perform, to act as assessor. I think that, so far as I can see, there may be other proceedings in this court, such as swearing in witnesses, which he does in his official character. But, beyond these general duties, I do not see there is anything else he can be called on to perform, or that he can insist on performing, unless he is specially called on to do so. Therefore I do not think there can be much difficulty in the application of that principle in auditing this account. It is said that the pursuer had performed some duties without being employed. Now there must be employment. I do not say that a special mandate is required. He is the general law agent of the corporation. But, still, if it can be made out that he really performed business for which he was not employed, and for which no other law agent would get payment, neither will he. Employment must be proved. But, with this element as to general principle before him, . . . the auditor will easily distinguish between what falls within the pursuer's official duties as town-clerk, and what does not.”

¹ *Turnbull and Others v. The Magistrates of Edinburgh*, 24 January 1812, 16 F. C., 491. In this case the Lord Ordinary (Woodhouselee) sustained the appointment *ad vitam aut culpam*, on the ground “that the

213. The law of Scotland recognises a distinction between (1) duties primarily imposed on the corporation of a royal burgh, and which have to be fulfilled by the magistrates or by the magistrates and council, who act only as the delegates of the burgh in relation to these duties; (2) duties imposed on the magistrates as administrators of the burgh, but which are not incumbent on the burgh as a corporation; and (3) duties entrusted to the magistrates, or magistrates and council, by special statute, as a selected body of delegates or commissioners for a public purpose but not as representing the burgh in that matter.

(1.) Among the duties of the *first* class may be mentioned—(a) The obligation which rested upon royal burghs previous to the passing of the Act 2 and 3 Victoria, cap. 42, to provide sufficient prisons, to appoint jailers, and to aliment prisoners convicted of crimes.¹ Failure in

office of chamberlain of the city of Edinburgh is an office forming no part of the original constitution or government of the burgh, and is therefore not regulated by the set of fundamental laws of the same;” that the office is “altogether a creature of expediency,” and “has been, at different periods, conferred in different terms, upon the persons who held it, sometimes by an annual election, sometimes at the pleasure of the magistrates, and sometimes intermitted or altogether disused;” that “there is no established or invariable usage by which the terms of the appointment can be regulated; and that, therefore, the magistrates for the time being have equally the right with their predecessors of judging upon what terms, with regard to duration or emolument, it might be expedient to confer the same.” The Court, however, reversed the interlocutor of the Lord Ordinary, and reduced the appointment, holding it to be *ultra vires* of the council.

¹ Previous to the passing of the act 2 and 3 Victoria, cap. 42, royal burghs were bound to have sufficient prisons; and were responsible not only for the sufficiency of the prisons but for the conduct of the jailer appointed by the magistrates. If, therefore, an incarcerated debtor escaped in consequence of the insufficiency of the prison or the negligence or connivance of the jailer, the common good of the burgh was responsible for the debt. Responsibility, however, did not attach to the burgh when the escape was not imputable to the magistrates or to the jailer, if it could be shown that after the prisoner had escaped all possible search had been made for him. The burgh was also held responsible for the aliment of criminals under sentence of imprisonment in its jail [*Ramsay v. The Officers of State*, 1st March 1825, 3 S., 409 (N.E. 597)]. This responsibility was entirely removed by the Act 2 and 3 Victoria, which transferred the obligation to provide and maintain prisons to certain county boards thereby created, and enacted (sec. 18) that all obligations, duties, burdens, and liabilities

the fulfilment of this duty subjected the common good of the burgh to claims of damages; and thus, when a debtor escaped in consequence of the insufficiency of the prison, or the neglect of the jailer, the property of the burgh had to make good the debt for which the prisoner was incarcerated, or otherwise to make reparation for the loss sustained by the incarcerating creditor.¹ (b) The obligation to maintain the

relative to the building, maintenance, and management of prisons, and the aliment, discipline, and escape of prisoners . . . imposed by any law, statute, or usage on magistrates of burghs, commissioners of supply of counties, or commissioners or trustees appointed under the authority of Parliament, or on any other person or persons whatever, shall cease and determine; and the funds hereby authorised to be raised or levied shall not be in anywise liable for the escape of any prisoner, but reserving action against the jailer for any neglect as touching the custody of any prisoner." That act was repealed by the Prisons (Scotland) Act, 23 and 24 Vict., c. 105, which vested prisons in county boards, but provided (sec. 76) that "nothing herein contained shall be held to alter the law with respect to the aliment of prisoners, or responsibility for the safe conduct of prisoners." It was accordingly held in *Lamb v. The Magistrates of Jedburgh* [18th July 1865, 3 Macph., 1105; 37 Jur., 580], that the corporate responsibility of magistrates for the custody of prisoners no longer exists, and that the property of the community is not liable for the premature liberation of a prisoner by an individual magistrate. This, however, would not relieve magistrates of burghs from such personal responsibility for the consequences of illegally liberating prisoners under the Act of Grace 1696, c. 32, as would attach by law to the delict or quasi delict of any other magistrates. But a mere error in judgment would appear not to render them liable in damages if their judgment were given *bona fide* [*Smith v. Nicholson*, 31st May 1853, 15 D., 697; 25 Jur., 453]. In the case of *Thomson v. The Magistrates of Kirkcudbright*, 23d January 1878, 5 Rettie, 561, the non-liability of magistrates for the alleged premature liberation of a prisoner was again recognised, and the jailer, who had merely certified a fact, was held not responsible for the debt. The administration of prisons in Scotland is now regulated by the Prisons (Scotland) Act 1877 (40 and 41 Vict., cap. 53), which repealed the Act 23 and 24 Vict., c. 105, except sections 72 to 75, both inclusive—appointed all expenses incurred in maintaining prisons and criminal prisoners after 1st April 1878 to be defrayed out of moneys provided by Parliament, and vested the prisons, the appointment of officers, and the safe custody of prisoners, in the Secretary of State. By the 70th section of the former act it was enacted that nothing contained in the statute should alter the law with respect to the aliment of civil prisoners, or with respect to the power and jurisdiction of magistrates of a burgh in regard to applications for aliment and for liberation of civil prisoners.

¹ *Affleck v. The Magistrates of Kirkcudbright*, 2d July 1803; H. of L., 20th March 1809, 5 Pat. Ap., 254. *Whitecross v. The Magistrates of*

streets of the burgh, and the consequent liability of the funds of the burgh for damages resulting from failure to keep the streets safe for the use of the community.¹

(c) The obligation to make reparation for damages done by mobs under the Riot Acts, 1 Geo. I., c. 5, and 57 Geo. III., c. 19.²

(2.) Among the duties of the *second* class are those connected with the exercise of jurisdiction and magistracy. "Jurisdiction and magistracy," Lord Neaves said,³ "are not proper duties of the burgh. They are functions devolved on its provost and bailies, *virtute officii* indeed, but independently of the community at large, and in which accordingly the councillors of the burgh have no right to participate or interfere." For any delict or quasi delict of the magistrates in the exercise of these functions the funds of the burgh are not liable. So it was held that the funds of the burgh were not responsible for a breach of duty on the part of its magistrates in not restraining a mob from pillaging a ship in the harbour and carrying off a cargo of meal.⁴ In the case of *Lamb v. The Magistrates of Jedburgh*,⁵ the Lord Justice-Clerk (Inglis) broadly stated the proposition thus:—"That the funds of

Edinburgh, 25th February 1819, 19 F.C., 649. *Lamb v. The Magistrates of Jedburgh*, 18th July 1865, 3 Macph., 1105; 37 Jur., 580.

¹ *Innes v. The Magistrates of Edinburgh*, 6th February 1798, Mor., 13189. *Threshie (the Dumfries Road Trustees) v. The Magistrates of Annan*, 11th December 1845, 8 D., 276; 18 Jur., 124. *Dargie v. The Magistrates of Forfar*, 10th March 1855, 17 D., 730; 27 Jur., 311. *Kerr v. Magistrates of Stirling*, 18th December 1858, 21 D., 169; 31 Jur., 100. See also opinion of Lord Medwyn in *The Ministers v. The Magistrates of Edinburgh*, 28th May 1845, 7 D., 663.

² *Bryson v. The Magistrates of Glasgow*, 20th November 1821; 1 S., 149, 156 (N.E.); 20 F.C., 453. In this case it was pleaded for the magistrates that such claims were payable, not by the magistrates themselves, nor out of the burgh funds, but out of the proceeds of an assessment upon the inhabitants. The Court, however, held that such damages were due by the magistrates and council as representing the community of the royalty of Glasgow, reserving their relief under the Riot Acts against the inhabitants.

³ *Dargie v. The Magistrates of Forfar*, *supra*.

⁴ *Campbell v. The Magistrates of Banff*, 28th February 1744, Mor., 2504.

⁵ 18th July 1865, 3 Macph., 1105; 37 Jur., 580.

a burgh shall be responsible for the illegal act of one of the magistrates certainly never was the law of Scotland."

(3.) Among the duties of the *third* class are those connected with the levying of the king's revenue in burghs, and other obligations imposed by special statute. Failure in the performance of these duties subjected the magistrates or magistrates and council who had failed to claims of damages, but the funds of the community were not liable. Illustrations of this rule are to be found in *Pearson v. The Town of Montrose*,¹ and the *Ministers of Edinburgh v. The Magistrates*.² In the former case it was held that the common good of the burgh of Montrose was not liable for the omission of the former magistrates to stent the inhabitants for the burgh's share of the king's revenue, but the court reserved to the pursuer his right to insist against the magistrates who had failed, their heirs and executors. In the latter case, the magistrates having failed to appoint stentmasters in terms of the Annuity Tax Act, the ministers were deprived of their annuity and brought an action against the magistrates and council; but the corporation were assoilzied from the action on the grounds stated by Lord Mackenzie, who said: "I am not satisfied that the common good of a burgh is liable generally for damages on account of faults committed by the magistrates or council of a burgh in discharge of duties imposed on them as magistrates or council directly by statute. It may be otherwise when the duty is primarily imposed on the burgh itself, and the magistrates or others act only as the delegates of the burgh in this duty, as in building and maintaining prisons and some other things." The latter judgment was affirmed by the House of Lords, and in advising the affirmance, Lord Campbell said: "Looking to these statutes, in what relation do the

¹ 23d June 1669, Mor., 13068.

² 28th May 1845, 7 D., 663; 17 Jur., 367; H. of L., 27th July 1849, 6 Bell's Ap., 509; 21 Jur., 632.

Lord Provost, magistrates, and councillors stand in the appointment of stentmasters? Only as parliamentary commissioners to do an act. They might have been compelled by legal process to do that act, and for any wilful refusal to do the act, or gross negligence in doing it, they would be personally answerable. . . . The case of *Pearson v. The Town of Montrose* (Mor., 13098), decided so long ago as the year 1669, when jurisprudence flourished quite as much in Scotland as at the present day, seems to me to rest on sound principle, and to be expressly in point. Under similar circumstances, the Court of Session found ‘the town and present magistrates not liable, *but*’ (that is *without*) ‘prejudice to the pursuer to insist against the then magistrates, their heirs and executors,’ thereby establishing the doctrine that for breach of any such statutory duty the remedy is against the individuals, and not against the corporation, although in respect of their being office-bearers in the corporation, the duty had been imposed upon them.”¹

214. All the royal burghs of Scotland possess what is termed a common good, which consists in different burghs of different descriptions of property, heritable and moveable. Independently of the separate tenements or burrowages which at an early period were held by individual burgesses as immediate vassals of the Crown, and for which they paid maill or rent, free grants of territory beyond the limits of the burgh were frequently made to the community in the original charters to the burgh, or by subsequent grants. Royal burghs also enjoyed exclusive privileges of trade and merchandise, and received other valuable rights—such as the right to levy tolls and customs on internal trade and merchandise—the right to hold burgh courts, and to receive the fines and issues of

¹ See also the case of *Forrester and Others v. The Magistrates and Town Council of Edinburgh*, and *Reid and Others* against the same defenders, 26th June 1860, 22 Macph., 1222; rev. H. of L., 15th February 1864, 2 Macph., H. of L., 7; 36 Jur., 325; 4 Macq. Ap., 603.

the courts—the right to levy dues on the admission of burgesses and guild brethren, etc. The lands conferred on the burgh, with the rents and profits received therefrom, and the annual income derived from the exercise of the various rights referred to, formed the common good or common property of the burgh; and in so far as it still exists, is held by the community, or by the magistrates as representing the community, to enable them to discharge the public duties and obligations to which they are subject. These duties and obligations comprehend the maintenance, in each case, of the municipal establishment of the burgh, with all that is involved in such maintenance, and the securing of those public objects which it was the primary and main purpose of such municipal establishments to effect. The common property of every royal burgh is therefore, to use the words of the Commissioners on Municipal Corporations in Scotland, “truly an estate held in trust by the community,” in the administration of which they are bound “to regard not merely the rights and claims of the individual members, but still more the future and regular charge of those public duties, and the permanent maintenance of these municipal establishments, for which, in part at least, the trust estate was created.”¹

215. From the earliest times, the administration of the property of each royal burgh was not entrusted to the absolute discretion of the magistrates and council, but was subjected to the supervision and control of the Great Chamberlain, to whom the magistrates had to account for all the branches of burghal revenue, and for the proper administration of the affairs of the burgh in every department.² In the fourteenth century the general practice with reference to the administration of

¹ General Report of Commissioners in 1835, p. 21.

² *Articuli Inquirendi in Itinere Camerarii*, Acts of the Parliaments of Scotland (Record Edition), vol. i., p. 680; *Ancient Laws and Customs of the Burghs of Scotland* (Burgh Records Society Edition), section 42.

the rents and revenues of royal burghs, as well as of the royal revenues, seems to have been to roup them annually to the highest bidder. This saved the expense of separate collection, and also the risk of arrears. But the tendency to favouritism appears to have led gradually to the granting of leases of the rents and revenues of burghs for a period of years, and this practice may have been facilitated by the transfer to the Lord High Treasurer, during the reign of King James I., of several of the functions of the Great Chamberlain, and the gradual relaxation of the supervision of the affairs of the burghs by these high officers of State. To prevent this and other acts of maladministration, the act 1491, c. 19,¹ enacted that the common good of all royal burghs should be "obscurit and kepit to the commoun gude of the toun, and be spendit in commoun and necessare thingis of the burgh," and that "inquesicioun be takin yerely in the Chaumerlaine aire of the expenses and dispositioun of the same. And attour that the rentis of burrowis, as landis, fischingis, fermes, myllis, and otheris yerely reueneues be nocht set bot for thre yeres allanerly. And gif ony hapinis to be set otherwayis that thai be of nane avale, force, nor effect in ony tymes to cum." Until the commencement of the sixteenth century, the universal practice seems to have been to let the common lands of the burgh on short leases, and not to permanently convey them or feu them out. This was also the practice as regarded the Crown lands; but in 1503 an Act of Parliament² authorised these lands to be permanently feued out, instead of being let on lease. The same right was conferred on lords, barons, and freeholders, but no reference was made to the lands of burghs—a fact which the Commissioners on Scottish Municipal Corporations account for by the wide differ-

¹ Acts of the Parliaments of Scotland (Record Edition), vol. ii. p. 227.

² 1503, caps. 36 and 37. Acts of the Parliaments of Scotland, vol. ii. p. 253.

ence between the true nature of burghal property and that of private individuals. It does not appear, they say, "that any legislative sanction of the practice of *feuing* such property was ever aimed at." But what the general law did not authorise, many of the larger burghs obtained authority to do by special licence from the Crown, with the result that much of the most valuable common property of the burghs was permanently alienated, for payment of annual sums which are now almost illusory. An act passed in 1535¹ refers to the disastrous effects, even at that time, of squandering the common good, and attributes the evil to the election of persons who were neither resident nor carried on trade in the burgh, to be "provest, ballies, and aldermen," and to their consuming, "for thare awine particular wele," the common good granted by the crown "for the vphalde of honeste and polecy within burgh." To check this abuse the act required the magistrates to bring yearly to Exchequer, at the day set for giving of their accounts, "thare compt bukis of thare commoun gudis, to be sene and considerit be the lordis auditoris,"—to whom the functions of the Great Chamberlain had been transferred,—"*gif the samin be spendit for the commoun wele of the burgh or nocht.*" It further required the magistrates to "*warne yerelie xv dais befor thare cuming to the chekker all thai quha likis to cum for examyng of the saidis comptis, that thai may argwne and impugne the samin as thai plesis, sua that all murmour may ceiss in that behalf.*" Notwithstanding this act, the maladministration of the common good of burghs seems to have gone on, and the act 1593, c. 39,² was passed to check it, and the pernicious practice,—which seems to have prevailed during the minority of King James VI.,—of granting commissions to individuals, under which the common property of burghs was diverted, from the public objects

¹ 1535, c. 35, Acts of the Parliaments of Scotland, vol. ii. p. 349.

² 1593, c. 39, Acts of the Parliaments of Scotland, vol. iv. p. 30.

to which it was properly applicable, to private uses. What these public objects were is indicated in the preamble of the act, which is as follows:—"Vnderstanding dyuers of the maist ancient burrowis within this realme to be greitlie decayit be want of traffiq and sic vther helpis, quhairby thay were mentenit of befoir, having small commoun guid and patrimonie nocht able to interteney the publict occasioun of his hienes service in parliamentis, conventionis of burrowis, and vtheris necessair adois and assemblies, intervening for the publict estait of the realme, farless to interteney the quiet and gude estait of the saidis burrowis in peace and weir. And nevirtheles be procurement of particuler personis affecting thair privat commoditie, and nawyis respecting the weill publict, the small patrimonie aper-tening to the burrowis hes bene converted and desyrit to be converted to particuler vses, to the quhilkis the same wes neur convertit of befoir, makand thairby the inhabitantis of the saidis burrowis (quha ar becum alreddie depauperat) to be vnhable ather for his hienes service, or to sustene the estait of the burgh, and that vnder pretext of certane pretendit commissionis purchest fra his hienes, with decreittis, sentencis, and ordenancis interponit thairto." To remedy these evils the act ordained that "the common guid and patrimonie of all burrowis within this realme salbe yeirlie bestowit, at the sicht of the magistratis and counsell of the saidis burrowis, to the doing of the common effayres thair of allanerlie, efter the yeirlie rowping and setting thereof, as vse is, conforme to his maiesties former actis and statutis maid anent the employing of the common guid within the saidis burrowis; and that the samyn be na vtherwayis bestowit or convertit to quhatsumeuir vse, or alteration maid thairanent in haill or in part, nochtwithstanding of quhatsumeuir commissioun charge or directioun gevin be his maiestie at ony tyme heretofoir be procurement of particuler parties in the contrair." But there is every reason to believe that this enactment had little effect

in retarding the impoverishment of the royal burghs by the misappropriation of their common property. The prevailing abuses again attracted attention during the reign of Charles II. In 1682 the Lord High Treasurer was required, along with the Lords Auditors, to call the magistrates of all royal burghs to account for spending their common good; and in 1684 a special commission was issued under the great seal, directing the Lord High Treasurer and treasurer-depute to institute a strict accounting with the magistrates as to the application of the common good of burghs from the period of the Restoration in 1660, and to make the magistrates personally liable to the burgh for all sums of money which should appear to have been unduly or profusely expended by them. Nothing, however, seems to have followed on this commission, which fell by the death of the king six months after it was issued, and was not renewed. For many years previous to the Revolution of 1688, the impoverished condition of the royal burghs was the subject of frequent complaint to the Convention of Royal Burghs; and on 9th July 1691 that body appointed commissioners, who visited all the burghs except Wick, Dornoch, Kirkwall, Bervie, and Galloway, and reported on the condition and state of each as to its trade and common good.¹ No special action on the part of the Convention seems to have followed on these reports; but in 1693 another act was passed anent the common good of royal burghs.² It sets forth "that the royal burroughs of the kingdom, erected and provyded with their respective publick goods and revenues by their Majesties royall ancestors, are of late, through the male-administration of the magistrates and others to whom the management of the said publick goods and revenues hath been committed, fallen under great debts and burthens, to the diminution

¹ The Reports of these Commissioners are printed by the Scottish Burgh Records Society in one of the volumes of its publications.

² 1693, c. 45. Acts of the Parliaments of Scotland, vol. ix. p. 309.

of the dignity of estate of burroughs, and the disabling them to serve the Crowne and government as they ought, and that the care, oversight, and controll of the said publick goods and revenues, and of the administration thereof, doth undoubtedly belong to their Majesties, by virtue of their prerogative royall." It then declared that, "also well for what is past as in time coming, their Majesties will give commissions, one or more, to such persons as they shall be pleased to nominate, to inquire into the condition and state of the common good and revenues whatsoever of all the royall burroughs, and how the samen hath been heretofore, or shall be hereafter employed, or misemployed, and to call the malversers and misemployers to make accompt, and to ordaine and decerne them and every one of them to refund and repay, or otherways repair the burrough or burroughs by them lesed, as the saids commissioners shall find them lyable." And "for preventing the like abuses and misapplications in all time hereafter," the act ordained "that every burrough royall within this kingdom shall, betwixt and the 1st day of November next to come, bring the Lords of their Majesties Thesaury and Exchequer an exact stated accompt, in charge and discharge, subscribed by the present magistrates and town-clerk, of their whole public good and revenue, and of the whole debts and burdens and incumbrances that doe affect the samen ; and farder," it was added, "it shall not be lawful for hereafter to the magistrates and town council of any burgh royall to contract any debt, or give bond for the samen, obligeing them and their successors in office, without a previous act made in the town councell, in their fullest conventioun, both of merchants and deacons of crafts, condescending upon the causes and uses for which the saids debts are contracted, and bonds granted; certifying the foresaids magistrates and others who shall contract debts and grant bonds without the said previous act, or if the causes and uses condescended on in the said act shall not be found to be just, true, and real, that

in any of the saids cases the saids contractors and subscribers shall be personally lyable, they and their heirs and successors, in their private fortunes, to relieve and disburthen the town of the saids debts, and that by decret of the lords of session, at the instance of any burghess of any of the saids burroughs who hath borne the office of provest, baillie, or dean of gild within the samen; but (*i.e.* without) prejudice always to the right and security of the party creditor, as likeways, but (without) prejudice to any private person's rights as to any of the saids burghs as accords." In 1694 the commission referred to in the preamble of this act was issued, but no record of its proceedings is extant, if any proceedings under it took place.

216. Such was the statute-law of Scotland relative to the administration of burghal property and revenue till the Act 3 George IV., cap. 91, was passed on 29th July 1822. That act, which is commonly known as Sir William Rae's Act,¹ enacts that a particular account of the common good and revenue of every royal burgh, made up to the date preceding the general annual election of magistrates, shall be annually stated, and deposited in the manner therein directed.² The account must be so made out as to exhibit a complete state of the common good, classed under different heads, specifying as well the amount of the debts owing by the burgh as its property; also the amount of each branch of revenue, distinguishing how much thereof has been received, and how much is in arrear, or remaining unpaid at the date of the account; also the amount of all sums received, or loans contracted for, annuities granted, and sums received in consideration thereof or on sale, or alienation of property, distinguishing the same from ordinary revenue; and also showing every sum paid, and every sum remaining unpaid for, or by reason of any expense incurred during the year for

¹ See Appendix XIV., pp. 148-154.

² 3 Geo. IV. c. 91, section 1.

which such account is so made out, distinguishing the fixed or ordinary from the casual or incidental expenditure, and also showing all cautionary obligations, positive or conditional, incurred by or on account of the burgh, distinguishing such as have been incurred during the year. It must be certified by the provost, or acting chief magistrate, and must be deposited in the office of the town-clerk within three months after the annual election of magistrates, and remain there for thirty days after the expiration of the three months, open to the inspection of the burgesses, who may state objections to it in writing, either during that time or within two months after the expiration of the thirty days, and may call for production of vouchers. If the objectors are not satisfied with the explanations given, any three or more burgesses may, within three calendar months of the expiration of the thirty days, complain in writing to the Court of Session,¹ who are required to determine the same in a summary manner.² The act further provides that when the magistrates and town council of any burgh, or any number of them, are the sole trustees for any charity foundation, or mortification, an account shall be annually stated and certified in the same way as, but distinct from the account of the common good and revenues of the burgh, and shall be deposited in the town-clerk's office at the same time that the annual account relative to the common good is deposited, and shall be open to the inspection of burgesses. In the event of these annual accounts not being made out and deposited in terms of the act, the provost, magistrates, and council of the burgh are severally liable to a penalty not exceeding £50 each, to be recovered with costs of suit upon information to the Court of Session,³ by three or more burgesses of the burgh. One-half of the penalties is appointed to go to

¹ As having come in place of the Court of Exchequer in Scotland, by virtue of the Act 19 & 20 Vict., c. 56.

² 3 Geo. IV., c. 91, section 3.

³ As having come in place of the Court of Exchequer.

the common good, and the other half to the burgesses suing for the same, or for such purpose as the Court may direct.¹ No complaint in regard to any annual account is competent beyond the term specified in the act.²

217. The Act 3 and 4 Will. IV., cap. 76, sec. 32, requires that, on or before the 15th of October in every year, the magistrates and council of every royal burgh shall make up a distinct state of their affairs, subscribed by the chief or senior magistrate, town-clerk, and treasurer, containing an account of all the funds, properties, and revenues in their administration, and of all their transactions in relation to such funds, properties, and revenues since they came into office. The account must be brought down as nearly as may be to the 15th of October, and must be kept in the town-clerk's or treasurer's office, for the inspection of any of the registered electors, from the 15th of October till the time of the annual election. A full and distinct abstract of the accounts, with a balance-sheet containing all necessary particulars, must also be printed and published by the magistrates on or before the 20th day of October annually. This act, it may be observed, only repeals such laws, statutes, and usages as are inconsistent or at variance with its provisions. The requirements, therefore, of the acts 1693, c. 45, and 3 George IV., cap. 91, so far as consistent with the Act 3 and 4 Will. IV., cap. 76, are still operative.

218. The common property of royal burghs may be divided into two kinds,—that which, being dedicated to the special uses of the burgh, is inalienable, and that which—not being so specially appropriated—may be sold, leased, feued, or otherwise disposed of by the magistrates and council for the benefit of the community, in

¹ 3 Geo. IV., c. 91, section 2.

² 3 Geo. IV., cap. 91, section 10.

the exercise of the trust of which they are the administrators. Erskine thus describes the former: ¹—"The second class of things naturally capable of appropriation, which the Romans exempted from commerce on account of their destination to special uses, were *res universitatis*; that is, things proper only to a borough, or an hospital, or a trading company, or some other lawful corporation or society. The property of these belongs not to the private members of the body corporate, but to the corporation taken jointly as such, and their use to every individual member of it; yet so as both property and use are subject to the regulations of the corporation; as town houses, market places, churchyards, public streets, corporation halls; the right competent to the burgesses of some corporations of pasturing cattle upon the boroughs' common, etc. But," he adds, "the revenues belonging to a state or corporate body, arising from the rents of lands, houses, customs, tolls, etc., are not to be classed with the *res publicæ* or *universitatis*; for though such revenues are the property of the state or corporation, the use of them is not allowed to any particular members of it; but are *juris privati* as truly as any trust right; for the directors or managers of those societies, after having received these revenues from the factors or others properly empowered to collect them, are bound, as other trustees, to apply them for the behoof of the corporation for whom they are trustees; 1491, cap. 36."²

¹ Erskine, B. ii., t. 1, sec. 7.

² The same distinction is recognised by the Commissioners on municipal corporations in Scotland in the following passage of their general report in 1835:—"Out of the wreck of common property which has escaped the destructive operation of the system we have been exposing, the remainder which still exists may be generally described as of two different sorts; the one of which has been considered in practice as alienable, and liable for the payment of debts; the other, such as does not properly admit of alienation or encumbrance.

"The burghal property which can be sold consists of lands, houses, mills, fishings, feu-duties, and other descriptions of heritage. These always formed the larger portion of the common good of burghs, and, in general, are situate within the royalty, or in its immediate neighbourhood.

(1.) Recognising this distinction, it has been held that magistrates are not entitled to encroach on, or feu out, any part of the streets of a burgh;¹ nor to sell the patronage of a church forming part of the common good;² nor to feu ground belonging to a burgh which had always been used by the inhabitants and others for such purposes as the bleaching of clothes and playing the game of golf;³ nor to carry on operations for detaching a portion from a public green, which from time immemorial had been devoted to public exercise and recreation, and applying it partly to widening the roadway of a public street, and partly to forming a footpath along the street;⁴ nor to take down, except on the ground of absolute necessity, and under judicial authority, a steeple forming part of the property of a burgh.⁵ It has also been held that the gaol and town house of a burgh, with its steeple and bell, and the petty

Arable lands, mills, and fishings are let for the duration, and under the stipulations, usual in the district, and houses from year to year; but, in some instances leases of longer duration have been granted, where a larger rent was given for a particular use, as for nursery ground.

“Several burghs possess personal property, which usually consists of shares in joint-stock companies, or of debts due by public trustees, or private persons. The former have almost uniformly been acquired for purposes beneficial to the burgh, such as the introduction of water or gas. In order to facilitate commercial intercourse, shares have, by some burghs, been purchased in road or harbour trusts, but, although well intended, this mode of investment is, in general, imprudent, because it is seldom profitable, is subject to great depreciation, and cannot be easily realised.

“The property not usually saleable consists of public buildings, such as churches, town halls, and market places, and common greens, or grounds set apart for the general use or enjoyment of the inhabitants. Large sums have occasionally been expended in building churches and market places; and, although not converted into capital, the expenditure, in many instances, has been proper, as well for obvious public reasons, as on account of the annual revenue derived from it.” (General Report, p. 32.)

¹ *Young v. Dobson*, 2d February 1816, 19 F.C., 75.

Magistrates of Montrose v. Scott of Brotherlaw, 27th February 1762, Mor. 13175.

² *Wallace v. The Magistrates of St Andrews*, 27th February 1824; 2 S. 758, (N.E., 629) 21 F.C., 481.

³ *Kelly and Others v. The Magistrates of Burntisland*, 1812, mentioned in note by Lord Cunningham (Ordinary) in *Home v. Young*, 18th December 1846, 9 D., 293.

⁴ *Adams v. The Magistrates of Glasgow*, 10th June 1868, 40 Jur., 524.

⁵ *Crawford v. The Magistrates of Paisley*, 10th March 1870, 8 Macph., 693; 42 Jur., 350.

customs could not be sold for behoof of creditors under a ranking and sale;¹ that certain rights or privileges of fishing, which belonged to the individual inhabitants of a burgh, as a matter of amenity, and which had never been a source of patrimonial gain to the burgh, could not be sold for behoof of its creditors;² that petty customs leviable by magistrates in virtue of the charter of erection could not be attached for the debts of the burgh, but were applicable exclusively to defraying its proper municipal expenses;³ and that no distinction exists between the right to levy petty customs and the customs levied by virtue of that right, nor between the customs necessary for the maintenance of the public functions of the burgh and the surplus not required for that purpose,—the measure of what is necessary being the extent of the grant itself.⁴

(2.) Subject to certain conditions, to be afterwards explained, the magistrates may lease, sell, or feu, for adequate consideration, the common good of burghs, not destined to special uses, when the act is unequivocally beneficial to the burgh. The only limitation upon their powers in this respect is thus stated by Erskine:⁵—“Leases for a longer term than three years of the rents of the revenue of boroughs royal, whether proceeding from lands, fishings, mills, or other subjects yielding a yearly profit, are prohibited by 1491, c. 36. But there is no limitation with respect to leases or feus of the lands or other subjects themselves, which therefore may be still lawfully granted by the magistrates and common council, as if the statute had not been enacted. (Dean, 4th July 1752, M., 2522.) For no more was meant by the legislature than to forbid the granting of leases to

¹ *Phin v. The Magistrates of Auchtermuchty and Officers of State*, 22d May 1827, 5 S., 690 (N. E. 644).

² *Beck v. The Magistrates of Lochmaben*, 10th July 1839, 1 D., 1212.

³ *Magistrates of Lochmaben v. Beck*, 16th November 1841, 4 D., 16.

⁴ *Kerr v. The Magistrates of Linlithgow*, 14th January 1865, 3 Macph., 370; 37 Jur., 172.

⁵ Erskine, B. ii., t. 3, sec. 15.

those who thereby became entitled to the tack duties payable by the tacksmen or tenants, and who, under the pretence of their undertaking the hazard of the deficiencies or bankruptcy of these tacksmen, frequently obtained such general leases at a considerable under value; which sort seems to have been known in our law as early as *Iter Camerarii*, c. 39, sec. 37.” Since Erskine wrote, however, the legislature has, by the Act 3 Geo. IV., c. 91, prohibited the feuing, alienation, or leasing for more than a year, of any part of the common good of a burgh, unless by public roup; and feuing or alienation without the authority of a previous act of council.¹

The following decisions illustrate the law on this subject. In the case of the Magistrates of Edinburgh *v.* Paterson,² reduction was sought of a feu and of a tack of Leith Links for two periods of nineteen years, on the ground that the feu and tack were alienations of the common good, and that the latter was granted for an inadequate consideration, and not by public roup. The court repelled the reasons of reduction, and sustained both the feu and the tack; but afterwards allowed a proof before answer, meaning that they would sustain the reasons of reduction if the consideration was found to be inadequate. In *M'Ghie and Others v. the Magistrates of Edinburgh*,³ reduction of a tack of customs, on the ground that it was granted for undervalue and without a public roup, was refused, reserving to the pursuers to insist against the magistrates for maladministration. In *Dean v. the Magistrates of Irvine*,⁴ it was held that the limitation which the act 1535, c. 35, introduced, applied only to leases of the rents and revenues of burghs derived from lands, fishings, mills, or other subjects yielding a

¹ See No. 223 of these Observations.

² *Magistrates of Edinburgh v. Paterson*, 1st February 1690, Mor., 2496.

³ *M'Ghie and Others v. The Magistrates of Edinburgh*, 16th December 1735, Mor., 2501.

⁴ *Dean v. The Magistrates of Irvine*, 4th July 1752, Mor., 2522. *Elchies, voce Burgh Royal*, No. 33; Notes, p. 82. See also No. 31; Notes, p. 31.

yearly rent, and did not restrict the right of magistrates to feu or lease these lands and subjects themselves for the benefit of the community. In *M'Dowal v. the Magistrates of Glasgow*,¹ it was held that the magistrates were entitled to sell a superiority, part of the common good of the burgh, and to apply the price in payment of debt; and in the *Magistrates of Selkirk v. Clapperton*,² it was held that magistrates cannot grant a feu of burgh property without the authority of an act of council.

(3.) The powers of magistrates to bind the community, and also the common good in so far as it is not destined to special uses, are thus stated by Bankton³:—"The magistrates and town council may grant bonds for affecting the community, and its public funds, and even the granters of them in their private capacity, and their heirs, if they had not only bound themselves in their public capacity, and their successors in office, and thereby the borrow, but likewise themselves and their heirs in a private capacity; or, if there was fraud on their part in the contracting, or if the money was applied to their own particular use. But such bonds will not affect the other burgesses or heritors in their persons or private estates, and which rule will hold as to the representatives of all other communities and corporations. But regularly magistrates, after demission from the office, are not liable for bonds granted by them *ratione officii*, or on account of such character, but only the magistrates for the time, and the community.⁴ The magistrates and town council cannot release a bond granted to the borrow, without payment of the sum, even tho' such discharge were given for good deeds done to the burgh; for such affected pretences, were they

¹ *M'Dowal v. The Magistrates of Glasgow*, 18th November 1768, Mor., 2525.

² *The Magistrates of Selkirk v. Clapperton*, 11th June 1828, 6 S., 955; 3 F., 994.

³ B. IV., t. 19, section 2.

⁴ *Boyne*, 15th February 1695, Fount.

allowed, might be very detrimental to the corporation.”¹ And again,²—“Tho’ the community is liable for the deeds of their magistrates, and has not the benefit of restitution, yet, if the debt is contracted without a previous act of the town council, expressing the causes and uses for which the money is borrowed, the magistrates who signed the bond, and their heirs, are bound to relieve the corporation, unless it is proved the money was applied for the utility of the burgh.”³ Relief is likewise granted to the burgh against the magistrates, as above, even tho’ an act of council regularly preceded the loan, if it is afterwards found that the causes therein expressed were not just and real. Action for behoof of the borrow is competent in these cases before the Lords of Session, at the instance of any burgess who had borne the office of provost, bailie, or dean of guild within it; but still the bond is good to the creditor, whether an act of council preceded the loan, or not, and whether the money was profitably employed for the behoof of the town, or not.”

The following decisions illustrate the law on this subject. In the case of the Archbishop of St. Andrews *v.* the Magistrates of Glasgow,⁴ the magistrates sought reduction of a bond granted by their predecessors to the archbishop for a tack of the teinds of Glasgow, on the ground that the bond was prejudicial to the town, in respect that the consideration therefor was inadequate. The court repelled the reason of reduction, but reserved action against the magistrates who granted the bond. In *Ross v. the Magistrates of Tain*,⁵ a bond was granted by nine of fifteen councillors in favour of the provost, without any previous act of council stating the causes and uses for which the sum in the bond was borrowed. The court held

¹ *Magistrates of Glasgow v. Barns*, 3d March 1685, Mor., 2515, referred to by Bankton as “Harcus (magistrates), March 3, 1688, town of Glasgow.”

² B. I., t. 7, section 105.

³ *Ross*, 13th February 1711, Mor., 2499.

⁴ *The Archbishop of St. Andrews v. The Magistrates of Glasgow*, 24th November 1685, Mor., 2496.

⁵ *Ross v. The Magistrates of Tain*, 13th February 1711, Mor., 2499.

that the heir of the grantee must prove the onerous cause for which the bond was granted, and that the sum borrowed had been applied for the benefit of the burgh. In *Honieman v. the Town of Dysart*,¹ the magistrates, who had granted a bond to one of the ministers for arrears of stipend, on which the succeeding magistrates had paid interest, were found liable *in solidum* to pay the sum in the bond and arrears of interest; but extract of the decree was superseded and the inhabitants ordained to be stented in relief. A similar course was followed with reference to a bond granted for the salary of the schoolmaster and the stipend of the second minister.² In *Bowie v. Wilson*,³ the court held that, under a bond granted by the magistrates of Culross as magistrates, and in which they bound themselves, conjunctly and severally, and their successors in office, the granters who had gone out of office were not liable, but only the town for whose behoof the money had been borrowed. But in *Clelland v. the Magistrates of Pittenweem and Others*,⁴ it was held that magistrates who had granted a bond were, by the special terms of it, liable after they had demitted office; but that their successors in office, who had also been charged for payment, were liable by the public law, which empowers magistrates to bind their successors in office; and that a charge once given to the magistrates in office for the time, does not fall by their going out of office. And in *Livy v. Mudie and Others*,⁵ certain persons who had been charged to pay a sum due under bond granted by them as magistrates of Arbroath, were held not to be personally liable except while in office, and while the funds of the burgh were under their administration, and were found entitled to suspension without caution, on granting conveyance of, or security on, the town's funds.

¹ *Honieman v. The Town of Dysart*, January 1685, Mor., 2510.

² *Lawson v. Simson and Others*, February 1686, Mor., 2510.

³ *Bowie v. Wilson*, 7th February 1695, Mor., 2511.

⁴ *Clelland v. The Magistrates of Pittenweem and Others*, 10th July 1752, Mor., 2511. Elchies, *voce* Burgh Royal, No. 35.

⁵ *Livy v. Mudie and Others*, 6th August 1774, Mor., 2512.

(4.) The validity of acts of magistrates rightfully in possession of office, as binding on the community, extends also, as has been shown, to acts of magistrates in the exercise of the functions of magistracy, though their election may afterwards be reduced. This forms the subject of special enactment in 16 Victoria, c. 26, section 6; but the same principle was recognised in decisions previous to the passing of that Act.¹

(5.) When a royal burgh has property, it may be sequestrated, and a judicial factor appointed,² who will be authorised to sell the property, in so far as not destined to special uses, and distribute the proceeds among the creditors of the burgh.³ It would also appear that, apart from sequestration under the Bankruptcy (Scotland) Act 1856, a burgh can be made notour bankrupt under section 7 of that statute, on the petition of the burgh itself with consent of a creditor.⁴ This could not be done previous to the Bankruptcy Act of 1856.⁵

¹ *Muirhead v. The Town of Haddington*, 30th June 1748, Mor., 2506. Elchies, *voce* Burgh Royal, No. 28; Notes, p. 79. In this case the community were held liable for accounts incurred to the agent of the magistrates and council, though their election was afterwards reduced, they being at the time when the accounts were incurred in the exercise of the magistracy, and in possession of the revenues of the burgh. In another case, however (*The Magistrates of Pittenweem v. Alexanders and Others*, 15th July 1774, Mor., 2527), a bond which had been granted by magistrates in office to an agent, for defending them against a complaint, which resulted in their election being voided on the ground of bribery and corruption, was reduced at the instance of the subsequent magistrates, so far as related to the community; reserving to the assignee of the bond his action against the granters, and to them their defences. Here, however, the bond had been assigned to the person for whose behoof the former magistrates had been bribed, and he seems to have been aware of the bribery, and of the consideration in respect of which the bond was granted.

See No. 192 of these Observations, and the cases therein referred to.

² *Beck v. The Magistrates of Lochmaben*, 30th June 1836, 14 S., 1056.

³ *Magistrates of Lochmaben v. Beck*, *supra*. *Wotherspoon and Hope v. The Magistrates of Linlithgow*, 19th December 1863; 2 Macph., 348; 36 Jur., 171.

⁴ See opinion by Lord Barcaple (Ordinary) in the case of *Wotherspoon and Hope v. The Magistrates of Linlithgow*, *supra*.

⁵ *Hogan v. Wilson and Magistrates of Musselburgh*, 19th February 1853, 15 D., 417.

219. It seems to be settled that burgesses of royal burghs are not entitled under the Acts 1491, c. 19; 1535, c. 35; 1593, c. 39; and 1693, c. 45,—to all of which reference has been made, to impugn, judicially, the accounts of the property and revenues of these burghs, or to call the magistrates and councils to a general accounting. This right appears to exist only in the crown.¹

In 1683 the right of burgesses to impugn the accounts of the magistrates was negatived by the Court of Exchequer. On that occasion the court refused to sustain process at the instance of private burgesses, so as to make it *actio vere popularis*, but found that by the acts 1491, c. 19, and 1535, c. 35, the High Treasurer (as come in place of the old Chamberlain and his Aire) may call the magistrates of any burgh to account how they spend their common good.² Another attempt to call magistrates to account for alleged misapplications of burghal revenues was made in the Court of Session in 1748, by burgesses of Selkirk; but the opinions indicated by the judges were so unfavourable to the pursuers that they did not venture to press for judgment.³ In 1752 some of the burgesses of Irvine instituted proceedings against the magistrates, but the court held that the pursuers could not call the magistrates to account for the town's revenues.⁴ In 1771 certain burgesses and inhabitants of Kinghorn sued the magistrates in the Court of Session for a general account-

¹ See Nos. 215 and 216 of these Observations.

² Captain Thomas Hamilton v. Sir James Fleming and other Magistrates of Edinburgh, 30th March 1683. Fountainhall's Historical Notices of Scottish Affairs (Bannatyne Club), I., 433; Fountainhall's Decisions, I., 231.

³ Lang and other Burgesses of Selkirk v. The Magistrates, 28th November 1748. Elchies, *voce* Burgh Royal, No. 27. Notes, p. 79. Remarkable Decisions of the Court of Session from 1730 to 1752, p. 181; Mor. 2515.

⁴ Burgesses of Irvine v. The Magistrates, 30th June 1752, Elchies, *voce* Burgh Royal, No. 31; Notes, p. 81. This seems to be the same case as Dean v. The Magistrates of Irvine, 4th July 1752, reported in Mor., 2522, though it is separately referred to by Elchies, No. 33; Notes, p. 82.

ing, and for inspection of the accounts of the common good and revenue of the burgh. The court, however, held that a general action for accounting, or general inspection of accounts, at the instance of each burgh, could not be listened to; and that all accounting relative to the common good and revenue of burghs was competent only in Exchequer.¹ In 1787 several burgesses of Dumbarton petitioned the Court of Exchequer to have the accounts of the burgh examined, pursuant to the provisions of the Act 1535, c. 35, but the court overruled the application, mainly on the ground that the statute had never been in observance, and had fallen into desuetude almost from its date; and that, even if it had been in observance down to the Union, the change in the constitution of the Court of Exchequer had abrogated that jurisdiction.² In 1820, again, an action was brought before the Court of Session by burgesses of Inverurie against the magistrates, charging them with gross mismanagement of the burgh property and revenues, and concluding that the magistrates should be ordained to bring specified sums to the credit of the burgh, and to enter into a general accounting. But the court found that questions concerning the management of the common good and revenues of royal burghs, or the contraction of debts by the magistrates, were incompetent before the Court of Session, except in so far as jurisdiction was conferred by the statute of 1693, c. 45; and that burgesses have no title to complain of acts of mismanagement on the part of the magistrates which do not directly affect their private and patrimonial rights.³

The result of the proceedings which have been taken

¹ *Gilchrist and Others v. The Magistrates of Kinghorn*, 5th March 1771, Mor., 7366.

² General Report of Commissioners on Municipal Corporations in Scotland, 1835, p. 29.

³ *Burgesses v. The Magistrates of Inverurie*, 14th December 1820. 20 F. C., 218. There is a case, *Ainsley and Others, burgesses of Jedburgh, v. The Magistrates*, 8th July 1707, Mor., 7330, which seems to support an opposite view, but it must be held to be overruled by the *Inverurie* and other later cases.

by burgesses against magistrates and councils of royal burghs, under the Act 3 Geo. IV., cap. 91, is described by the Royal Commissioners on Municipal Corporations in Scotland. "It is unquestionable," they say, "that the provisions of that act, however well intended, have proved nearly useless."¹

The Act 3 and 4 Will. IV., cap. 76, gives registered municipal electors a right to inspect the annual accounts made up in terms of its requirements, and provides for publication of abstracts of these accounts, but confers no right either on burgesses or electors to challenge the accounts."

220. But burgesses may sue the magistrates and council to have their individual patrimonial rights declared and protected, and also, it would seem, to prevent special acts of maladministration with reference either to the heritable property of the burgh or its revenues.

The following decisions illustrate the law on this subject. In the case of *Johnston v. the Magistrates of*

¹ In their report on Municipal Corporations in Scotland, in 1835, the Royal Commissioners said,—“However well intended, it is now unquestionable that the provisions of this act [3 Geo. IV., cap. 91] have proved nearly useless. There have been six different suits under it, in three of which the burgesses failed; in one they were successful, and in two others the proceedings were not brought to a conclusion. The first of these suits, which was instituted by the burgesses of Nairn, will be sufficient to illustrate the practical difficulties which arose. In 1823 an information was filed at the instance of certain burgesses against the magistrates, for the penalties exigible under the 8th section of the Act, on the allegation that, in the sale of certain lands, the statutory provisions had not been complied with. It was necessary to prove that the complainers were burgesses; and their legal advisers, who were cognisant only of the law of Scotland, were of opinion that the production of burgess tickets, and the testimony of the town-clerk, would be sufficient evidence. Burgess-tickets are usually in the form of extracts or certified copies, taken from the records of the town council, subscribed by the clerk, and in Scottish courts are admitted as evidence of burgess-ship. But a different rule prevailed in the Exchequer, which affected to observe the English forms of judicial procedure; and, on producing those documents as evidence, the objection was taken that, by the law of England, extracts, although authenticated, are not evidence, so long as the principal record is extant. The objection was sustained; and production of the record having been called for, and not made, a verdict against the complainers was immediately directed and given, which was followed by heavy costs. It is understood that, had this objection been unsuccessful, numerous other

Edinburgh,¹ the title of a burghess to pursue a reduction of a feu, granted by the magistrates, of the mills belonging to the city, was sustained, on the ground that if the magistrates malverse in setting the common good, they may be sued for malversation by the party lesed, and he may also pursue reduction against the person preferred. In *Anderson and Others v. Magistrates of Renfrew*,² certain burgesses having raised a reduction of a long lease, granted by the magistrates and council, of common property over which the pursuers had acquired a right of pasturage by immemorial possession, the title of the pursuers as private burgesses to sue was objected to, but was sustained. In *Burgesses of Irvine v. the Magistrates*,³ the title of burgesses, as heritors and burgesses, to quarrel a lease by the magistrates of their commonalty was sustained, in respect of their immemorial custom of pasturing cattle upon it. In *Gilchrist and Others v. the Magistrates of Kinghorn*,⁴ the court, while dismissing an action for general account-

technical objections, derived from English practice, were in reserve, some of which must have been sustained. A detail of the causes of failure in the other cases would be superfluous; and it is sufficient to observe that, in the opinion of the country, this statute is not fitted to afford any practical remedy." General Report, p. 30.

Erschine thus states the law applicable to Nos. 219 and 220 of these Observations:—"Ever since the Revolution the care of the revenues of boroughs is, by 1693, cap. 28, declared to belong to the crown. Hence, the maladministration of borough revenues is to be considered rather as a matter of public government than the subject of a popular action in a court of law; and, therefore, no private burghess, or number of burgesses, seem entitled to such action against their magistrates. Yet where the burgesses have a patrimonial interest, *ex gr.*, of pasturage in any commonalty granted to the borough, they have a right to sue the magistrates for declaring that interest which belongs to them as private burgesses." (B. I., t. 4, sec. 23.) But see the opinions of the judges in *Aitchison v. The Magistrates of Dunbar*, 4th February 1836, 14 S., 421; 11 F., 349; quoted in footnote to No. 222 of these Observations.

¹ *Johnston v. The Magistrates of Edinburgh*, 23d July 1735, Elchies, *voce* Burgh Royal, No. 4.

² *Anderson and Others v. The Magistrates of Renfrew*, 30th June 1752, Mor., 2539.

³ *Burgesses of Irvine v. The Magistrates*, 30th June 1752, Elchies, *voce* Burgh Royal, No. 31, notes, p. 81. See footnote 1, p. 383.

⁴ *Gilchrist and Others, v. The Magistrates of Kinghorn*, 5th March 1771, Mor., 7366.

ing, declared that when individuals complained of a particular wrong, the action would be sustained, and redress given. In *Baxter and Others, burgesses of Cupar, v. Monro*,¹ the court suspended an act of the town council granting £40 to Monro, a vintner in the burgh, upon the narrative of good services to the town. The title of the pursuers was challenged, but was sustained after full discussion. And in *Magistrates of Lauder v. Spence and Others*,² the burgesses and magistrates having instituted mutual actions of declarator relative to their respective interests in a commonalty, the court held that although each burghess might sue for his individual interest, yet, as the action at the instance of the burgesses was raised by them as a body, it must be dismissed, as they were not a corporation; and it was the more irregular in that it concluded for decree in favour of all the burgesses, while they were not all pursuers.

221. A minority of a town council may challenge an act of council with reference to the alienation or administration of the property of a royal burgh on the ground either that it is *ultra vires* or that it is against the interests of the community. Of this there are illustrations in the cases of *Baxter and Others v. Monro*,³ *Aitcheson v. the Magistrates of Dunbar*,⁴ and *Nicol v. the Magistrates of*

¹ *Baxter and Others v. Monro*, 1772, Brown's Sup., *voce* Title to Pursue, vol. v. p. 629. The reporter states that the challenge was brought at the instance of some magistrates and councillors of the burgh; "but this," he adds, "does not seem to make any difference."

² *Magistrates of Lauder v. Spence and Others*, 17th May 1821, 1 S., 17 (N. E., 15).

³ In *Baxter and Others, burgesses of Cupar, v. Monro*, *supra*, some magistrates and councillors of the burgh successfully challenged an act of the town council, by which £40 was granted to Monro on the narrative of good services to the town.

⁴ *Aitcheson v. The Magistrates of Dunbar*, 4th February 1836, 14 S., 421; 11 F., 349. In this case a minority of the town council of Dunbar instituted an action in the Court of Session, to have a resolution of the council, by which it was alleged the property of the burgh was proposed to be improperly alienated, declared to be illegal and reduced. In defence, it was pleaded—(1) that the pursuers, as burgesses, had no title to insist in the action, the act complained of not affecting their private and patrimonial interests; and that the circumstance of their being a minority of

Aberdeen. In the case last named the court, while holding that they possessed jurisdiction to prevent abuse in the exercise of power or discretion on the

the town council, as well as burgesses, could not of itself give them a title; (2) that the pursuers had no interest to insist in the action, in respect that, before it was instituted, the act of council thereby challenged had been voluntarily rescinded and annulled; and (3) that the Court of Session had no jurisdiction in such a question, which was one of public moment, and relating to the maladministration of the property of the burgh. The statute 1693, c. 28, it was pleaded, was required to give the Court of Session jurisdiction in the particular case of the magistrates contracting debt without a previous act of council, thereby implying that it had no jurisdiction in such matters at common law, and the statute 3 Geo. IV., c. 91, points out the Court of Exchequer as the proper tribunal in which to seek redress in such a case as the present. The Lord Ordinary (Cockburn) repelled the defences, and issued the following note:— (1.) “None of the authorities relied on by the defenders support the first defence—the pursuers being not mere burgesses, but a minority of the town council. (2.) The second defence overlooks that the pursuers do not merely seek to have the act of council rescinded, but to have it declared illegal, without which it might be re-enacted at pleasure. (3.) The 3 Geo. IV., c. 91, applies to cases of accounting and of alienation, not to proceedings like the one now challenged.” The defenders reclaimed, but the Court adhered. At advising, the Lord-Justice Clerk (Boyle) said,—“I am of opinion that the title on the part of the pursuers is good. The present question has nothing to do with the right of individual burgesses to complain of acts of the magistrates, because this action is brought at the instance of four constituent members of the town council, who were in the minority when the act complained of passed. They aver that the act was illegal, and so fundamentally null and void. The action is a complicated one; there is a petitory conclusion, but there are likewise reductive and declaratory conclusions. It is possible that, as the action is proceeded in, there may be ground to pause, as to whether the matters of accounting under the petitory conclusion can be taken up. The Court of Session is the only tribunal competent to reduce an illegal act or resolution, or declare its illegality. I deny the right of the Court of Exchequer to reduce by a formal decree of reduction, or declare an act to be illegal. And then the question is, Was this such an act? If it were incompetent to bring this action, it would be an admission of the existence of a gross wrong for which there is no remedy. I must hold it competent for the minority of the council, averring that this resolution was passed ‘to their hurt and prejudice,’ to bring this reduction and declarator. And if these parties have a title to sue, it appears to me they are entitled to have a judgment from this court. The reductive and declaratory conclusions steer quite clear of the other.” Lord Glenlee said,—“The only question is, whether the pursuers are not entitled to have it declared that this resolution was illegal and void? I do not rest on the circumstance that they are members of the town council, but that they complain as burgesses of the illegality of an alienation of the town’s property. As the illegality of the act is asserted here, I am not disposed to carry too far the distinction between burgesses and town councillors. I am inclined to think, that at common

part of a municipal corporation, refused in the circumstances to interfere with the town council in its management of the burgh affairs.¹ This case is important, as

law, burgesses have an interest and title to look after matters of this sort. In Erskine's time this was doubtful, but in the passage referred to, he speaks as to the administration of the burgh revenues. I believe there are decisions sanctioning the right of burgesses to pursue the magistrates for setting property beyond the legal time, and I think they are entitled to insist in an action to have it declared that the magistrates have no right gratuitously to alienate the property of the burgh." Lord Meadowbank said,—“Lord Glenlee has expressed my opinion on every point. . . . In an action with petitory conclusions alone, the decisions referred to may be sufficient to prevent burgesses having simply a personal interest from suing, but they do not apply to the having an act of council reduced and declared illegal. I should not say that a burgess had not this power, but a minority of the council clearly have the right.” Lord Medwyn said,—“Recollecting the case of Inverury, I had at first some difficulty in agreeing with the Lord Ordinary, but my doubts are now removed. . . . As to the jurisdiction of this court, the accounting provided for in Exchequer has nothing to do with a reduction and declarator such as this. The present case stands quite clear of the Statute of Geo. IV. The court has jurisdiction just as it had in the case of the Magistrates of Selkirk, where a reduction at the instance of a town council of the act of a previous town council was held good, and this goes far to sanction the title of a minority. I do not go on the right of burgesses alone, but hold that the minority, being also burgesses, have an interest, and are entitled to try this question of the legality of an act of the council in the only court where the question could competently be brought.”

¹ Nicol v. The Magistrates of Aberdeen, 20th December 1870, 9 Macph., 306. In that case the Lord President (Inglis) said: —“It is in the jurisdiction of this court to interfere and control the proceedings of a municipal council upon sufficient ground—upon the ground either that there is plain excess of power on the part of the council, or upon the ground that what they are proceeding to do is plainly against the interests of the community which they represent; but where there is no excess of legal power, it certainly requires a very strong case to induce the court to interfere with the discretion which the law vests in the municipal council in the first instance. The objection of excess of power I do not understand to be seriously insisted in here. I do not think it can be maintained as an abstract proposition that the town council is not entitled to buy a *pro indiviso* share of that estate. It would be a perfectly expedient purchase in some circumstances, and there is, so far as I can see, nothing illegal in such a purchase in itself. No doubt it may be very inexpedient; it may be so obviously and absolutely inexpedient—it may be so plainly done not in the interests of the community or for the purpose of furthering the interests of the community, but for some other and unworthy purpose,—that this court would be called upon to interfere to prevent it; and the question is whether we have evidence before us to justify such allegations as these? Now, in this case, I think it is pretty well ascertained—we have a good deal of information before us—that this Torry farm is situated very

showing the wide discretion which the court recognises to exist in town councils of royal burghs, as regards the acquisition of lands in the neighbourhood of a burgh,

close to the town of Aberdeen, but at the same time it is separated from it by the river Dee; and while, I daresay, if the river had not been there, the ground of Torry farm would have long ago been built upon, the building is not likely to proceed very fast, unless there be a bridge thrown across the Dee at this point, which does not exist at present. But although that obstacle exists to the extension of the town in that direction, I think it is not difficult to believe that some time or other, and probably at no very distant date, the prosperous and increasing town of Aberdeen will force its way across the river some way or other, and that this ground will be occupied by buildings; and one cannot but see that the purchase of land so situated is not merely a natural proceeding upon the part of the municipal corporation, but one that, in ordinary circumstances, is highly expedient. It gives them an opportunity, which is by no means undesirable, of controlling and regulating the extended buildings of the town; and, even in a sanitary point of view, apart from the interests of taste and architecture, that may be a very important power and control for the municipal corporation to possess. In short, no one I think can doubt that the purchase of land in the immediate vicinity of a burgh is a very natural and a very expedient proceeding upon the part of the administrators of the burgh.

“ But it is said that they have got no money, and that, apart from everything else, it is a mere purchase of land on speculation, and therefore a very improper proceeding. Now, I certainly am quite prepared to admit that a purchase of land with borrowed money is anything but an expedient proceeding in the ordinary case. Nothing can be more ruinous than that generally turns out to be; but is that the state of the fact here? I think not. The town of Aberdeen may not at this moment be in possession of ready money sufficient to pay for the purchase which they propose to make—that is to say, they have not got the money in bank—but I do not think that is any objection, either to the principles of finance on which they proceed in the administration of their affairs, or to the completion of this purchase. It is a very bad plan indeed to keep money in bank. There cannot be a worse investment for money. It is next worst to keeping it locked up in a box; and, therefore, every prudent man and every prudent corporation invests his or their money in some better way than by leaving it in his or their bank account. It is not pretended that there are not resources at the command of this corporation quite sufficient to justify them in making the purchase, or that they cannot realise investments, which they may not think so beneficial as this, and convert the money now invested in that way into an investment in the purchase of this subject. Therefore, so far as the finance is concerned, I do not see any objection at all to the proceeding. It is not a speculative purchase in the sense that they are going to borrow money for the purpose of making the purchase, and trust to the value of the subject being so great that the annual produce of the subject will be more than sufficient to keep down the interest upon the borrowed money. It is not a proceeding of that kind at all. On the contrary, it is a mere proposal to convert one investment into another,

with a view to future extension of the town and the benefit of the community. The court will not interfere, however, on the complaint of a minority, in the form of a suspension and interdict, to recall or prohibit an appointment made by magistrates or councils in which third parties have a *jus quaesitum*.¹

222. The magistrates and council of a burgh may also challenge illegal acts of their predecessors affecting the common good or imposing obligations on the community. Of this the following are illustrations. In the case of the Provost and Magistrates of Glasgow *v. Barns*,² the magistrates sued a former provost for payment of £1700 due by him to the town under a bond, notwithstanding that it had been discharged by an act of council for the alleged onerous cause of good service done to the city, and the court decerned against him. In *Magistrates of Pittenweem v. Alexander and Others*,³ the pursuers sought and obtained reduction, so far as the community were concerned, of a bond by their predecessors, and of the acts of council in virtue of which it was granted, in respect that the bond was for the expense of defending the granters against a complaint on the head of bribery and

which may, no doubt, as in most cases it does, necessitate the borrowing in the meantime, perhaps for a single term, of the price or sum required for the purchase, until the other security can be realised; but that is mere matter of temporary financing, and has nothing to do with the permanent nature of the investment."

¹ *Cunninghame v. The Magistrates of Edinburgh*, 3d December 1800; 12 F.C., App. 10; Mor., 7, App., Burgh Royal. In this case a bill of suspension and interdict, at the instance of an individual member of council, complaining of an act appointing an additional minister within the burgh, on the ground that its revenue was not in a situation to pay his stipend, was held to be incompetent. The court, it was observed, in a proper action brought for that purpose, will control magistrates in the expenditure of the revenue when special acts of malversation are brought against them, but they have no power, in such summary form, to recall or prohibit an appointment made by a corporate body, in which a third party has a *jus quaesitum*, on vague allegations that the revenue is insufficient for its support.

² *Magistrates of Glasgow v. Barns*, 3d March 1685, Mor., 2515.

³ *Magistrates and Town Council of Pittenweem v. Alexanders and Others*, 15th July 1774, Mor., 2527.

corruption, which had prevailed. And in the *Magistrates of Selkirk v. Clapperton and Others*,¹ the magistrates and council sued for and obtained reduction of a charter granted by their predecessors, and of the infestment following thereon, on the ground that the charter had not been regularly authorised by the council, and being, moreover, a gratuitous alienation of the burgh property, was *ultra vires* of the granters.

223. All feus, alienations, or tacks for more than one year of any heritable property forming part of the common good of a royal burgh, and all tacks of the common good, must proceed by public roup or auction, of which public notice must be given by advertisement published once at least twenty days preceding the day of roup or auction, in some newspaper printed in the burgh, if any such newspaper is there printed, and if no newspaper is there printed, then in some newspaper published in the county wherein the burgh is situated, or if no newspaper is published in the county, then in a newspaper published in the next adjoining county or counties in circulation in the burgh, and also by written or printed notices affixed to and continued upon at least three conspicuous places in the burgh, of which the door of the principal church must be one, at least twenty days preceding the day of such roup or auction.² No such notice must be given until the council has passed an act specifying the particulars of the proposed feus or alienations; and the newspaper notices must be given for the first time during the winter or summer sittings of the Court of Session, and at least twelve days before the end of such sittings,³ in order that the court may, if it think

¹ *Magistrates of Selkirk v. Clapperton and Others*, 11th June 1828, 6 S., 955.

² 3 Geo. IV., cap. 91, section 5.

³ The Act 3 Geo. IV., cap. 91, requires these notices to be given "during an Exchequer term, and at least twelve days before the end of such term." The Act 19 and 20 Vict., cap. 56, section 26, enacts as follows:—"That part of the winter sitting of the Court of Session which

proper, grant an injunction, upon application made for that purpose by any three burgesses, against the proposed feu or alienation, or do otherwise in the matter as it may consider just.¹ Feus, alienations, leases, or tacks granted otherwise than in terms of the act are null and void, and the provost, magistrates, or members of council making, authorising, or directing them, or being otherwise instrumental therein, are severally liable in a sum not exceeding £50 each, to be recovered and applied in the same manner as the penalties for failure to make and deposit annual accounts.²

224. Every person employed in the collection or levying of cess, stent, or any local tax, or imposition leviable within any royal burgh, must, under a penalty not exceeding £10 for each offence, specify separately and distinctly in every receipt to be given for the same, for what purpose, by what authority, and at what rate, or according to what rule, every sum or imposition is demanded from the burgesses and inhabitants of the burgh. This penalty is payable one-half to the informer and the other half to the common good, and is recoverable with costs of suit in the same way as any penalty against the provost, magistrates, or councillors may be recovered by the Act 3 Geo. IV., cap. 91.³

225. The Act 3 Geo. IV. cap. 91, further enacts,⁴ that it shall not be lawful for the magistrates or town council of any burgh to contract any debt, grant any obligation,

precedes the Christmas recess, and that part of such sittings which follows such recess, and the summer sittings of the Court of Session shall be held to correspond with the terms heretofore observed in the Court of Exchequer."

¹ 3 Geo. IV., cap. 91, section 6.

² 3 Geo. IV., cap. 91, section 8.

See the case of *The Magistrates of Selkirk v. Clapperton*, 11th June 1828; 6 S., 955; 3 F., 994, referred to in No. 218, sub-section (2), and No. 222 of these Observations.

³ 3 Geo. IV., cap. 91, section 7.

⁴ Section 11.

make any agreement, or enter into any engagement which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made in that behalf; and any such contract, obligation, agreement, or engagement made and entered into without such act of council, is declared to be void and null as against the common good of the burgh, or the succeeding magistrates or town council thereof, without prejudice nevertheless to the personal liability and responsibility of the persons by whom the same may have been entered into. It will be observed that this act does not require the cause of borrowing money to be specified in a minute of council. It must be remembered, however, that the Act 3 Geo. IV., cap. 91, does not repeal the statute 1693, cap. 45; compliance with the provisions of the latter statute, in so far as not directly superseded by the former act, is therefore necessary.

226. No penalties and expenses in which any magistrates or town councillors of any royal burgh may be personally subjected, by virtue of the Act 3 George IV., cap. 91, or any part thereof, can be paid from or taken out of the common good or revenue. But the parties making any complaint, or bringing any information under the act, must, within eight days after the same has been made or brought, enter into a recognisance to pay costs of suits, in case the same may be awarded.¹

227. The several acts and decisions above referred to, relative to the common good of burghs, show that royal burghs in Scotland have not the full and unrestricted capacity in regard to it which an ordinary individual possesses of dealing with his own absolute property. On the contrary, they are bound to apply it to the objects for which the burgh is constituted, to exhibit accounts, and to conform to special rules imposed by statute, with a view to the restriction of their powers of feuing, selling, or leasing

¹ Section 12.

heritable property, or creating debt. The common property of every royal burgh, in fact, belongs not even to the whole body of the burgesses at any particular time, but to the burgh as a corporation, which is a legal entity separate from and additional to the members composing it, and is held by the magistrates and council in trust for the corporation, to enable it, in all future time, to discharge its duties to the state, and its functions as a municipal body. In the administration of this trust, where it is not limited by the terms of the charter or statute under which the common good is administered, the magistrates and council are entrusted with a wide discretion, which will not be lightly interfered with; but in its exercise they are undoubtedly liable to be controlled by the court, on complaint by the crown, or by a minority of the council, or by individual burgesses, in so far as their patrimonial interests are affected, or even, it would seem, when special acts of maladministration are challenged. The action of the magistrates and council, in so far as *ultra vires*, or prejudicial to the interests of the community, may also be impugned in many cases by their successors. It is impossible to define with any degree of precision the limits within which the magistrates and council may exercise their discretionary power. Each case must be determined with reference to the special circumstances, for it is obvious that what might with perfect propriety be done by one burgh, would be unwarrantable if done by another, under different conditions and circumstances. But it may be stated as a rule applicable to all burghs, that every act of administration must be honestly and faithfully done for the benefit of the burgh; and appropriations of the common good to purposes which do not benefit the burgh as a whole, or which may incapacitate it from performing its proper public functions, or lead to such incapacity, will not be sustained by the court, if competently challenged. Much diversity of opinion may often exist, however, as to what is for the benefit of the burgh, and

the most that can probably be said on the subject is, that the benefit must be limited to no particular class, and that in the pursuit of it, the primary objects of the burgh must not be sacrificed or endangered. In the consideration and determination of questions which may arise on this subject, little assistance is to be derived from decisions of the Scotch courts. From time immemorial the magistrates and councils of royal burghs in Scotland have exercised their discretion in the administration of the common good unchallenged, save in a few cases usually of an extreme kind. When their discretion has been challenged in relation to acts in which no suspicion of *mala fides* existed, or no clear breach of trust law was shown, the courts have shown great indisposition to interfere with it. Neither can much that is applicable to Scotch burghs be drawn from English decisions, for they mainly relate to burghs which are subject to the provisions of the Municipal Corporation Act, 5 and 6 Will. IV., c. 76. The powers of the town councils of these burghs in relation to the common good and borough fund are strictly defined by that and other statutes, and therefore their discretion is of no wider character than that of statutory trustees, to which reference will afterwards be made.¹

¹ Before the Municipal Corporation Act, "municipal corporations were owners of estates, and they might spend the estates subject to very little control; and, in point of fact, there was great jobbery and great waste of the estates; and one very great object of the Municipal Corporation Act was to restrain the town council." [*Per Mr. Justice Blackburn in The Queen v. The Mayor of Sheffield*, 1st June 1871, L.R., 6, Q.B., 660.] That mismanagement and jobbery did also exist to a large extent in the administration of the common good of burghs in Scotland, is made too apparent by the reports, in 1835, of the Scotch Municipal Commissioners, who, finding that the provisions of none of the existing statutes afforded sufficient protection against maladministration, recommended the enactment of several stringent regulations for that purpose. Those recommendations have, however, not been given effect to, and the influence of intelligent public opinion is probably sufficient to prevent serious future abuse.

By the 92d section of 5 and 6 Will. IV., c. 76, it is enacted "that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interests, dividends, and annual proceeds of all monies, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A) and (B), or to any member or officer thereof in

The common law, and in many cases the charters of particular royal burghs in Scotland, recognise as

his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the monies which he shall so receive shall be carried by him to the account of a fund to be called '*The Borough Fund*;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings, either at law or in equity which have been already instituted or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer, whom the council shall appoint, and also towards the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expenses of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough. . . .

And in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorised and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and in order to raise the amount so estimated, the said council is hereby authorised and required, from time to time, to order a borough rate in the nature of a county rate to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace assembled at the general or quarter sessions in any county in England have within the limits of their commission," by virtue of the Act 55 George III., cap. 51.

This section, it will be observed, constitutes a "borough fund," into which must be paid the rents and profits of the heritable estate of the borough, and the annual income derived from its moveable estate, as also all fines and penalties for offences under the act, and declares that fund to be liable for the payment of—(1) debts contracted previous to

objects to which the common good is applicable, the support of the ministry, the erection and maintenance

the passing of the act, and interest thereon; (2) of the salaries of the mayor, recorder, town-clerk, and other officers of the borough, and the expenses connected with the preparation of burgess lists and of elections; (3) of expenses connected with the punishment of offenders, the maintenance of the borough gaol, house of correction, and corporate buildings, and the payment of constables; and (4) of all expenses not otherwise provided for by the act, which shall be *necessarily incurred in carrying into effect the provisions thereof*. In the event of the borough fund being more than sufficient for the purposes thus enumerated, *and only in that event*, can the surplus be applied by the council for the *public benefit of the inhabitants and the improvement of the borough*. When the borough fund is insufficient for the payment of the expenses incurred in carrying into effect the provisions of the act, the council may impose a rate to make up the deficiency. These provisions (which have been amended by 6 and 7 Will. IV., cap. 104, section 1, and 7 Will. IV., and 1 Victoria, cap. 78, section 28, in regard to the contracting of debt and the granting of securities therefor), it has been held, apply to personal as well as to real estate [*Ex parte* the Corporation of Hythe, 1840, 4 Younge and Collyer (Chancery), 55. See also the Corporation of Liverpool, 1835, 1 Mylne and Craig (Chancery), 199], and have nothing corresponding to them in any of the public statutes applicable to Scotch burghs. Under them it has been held that a salaried officer, *e.g.*, the recorder, cannot maintain an action against the corporation for arrears of salary [Addison v. The Mayor of Preston, 21st April 1852, 12 Common Bench, 108]; that the town-clerk can only claim payment for actual disbursements connected with the preparation of burgess lists, etc. [Jones v. The Mayor of Carmarthen, 7th June 1841, 8 Meeson and Welsby (Exchequer), 605]; and that the words authorising payment out of the borough fund of all expenses "*necessarily incurred in carrying into effect the provisions of this act*," do not warrant the charging against that fund, when there was no surplus, of the expense incurred by a corporation in opposing a bill in parliament for the regulation of a water works company [The Queen v. The Mayor of Sheffield, 1st and 10th June 1871, L.R., 6, Q.B., 652]; nor the expense of a bill before Parliament for improvements within the borough [Attorney-General v. The Mayor of Norwich, 4th May 1848, 16 Simons (Chancery), 225]; nor the expense of an Act of Parliament for the improvement of a river flowing through the borough [Attorney-General v. The Mayor, etc., of Norwich, 4th November 1851, 21 L.J., Ch. 139]. But when there is a surplus of the borough fund, which may be applied for the public benefit of the inhabitants and the improvement of the burgh, the council have, in the words of the Lord Chancellor (Cottenham), "a very large discretion, and like every other discretion given for public purposes, to be honestly and faithfully exercised." It has accordingly been held that the corporation may apply such surplus funds in defending themselves against proceedings having for their object the destruction of the corporation [Attorney-General v. The Mayor of Norwich, May 1837, 2 Mylne and Craig (Chancery), 406, affirming the judgment in 1 Keen (Chancery), 700]; and in opposing in parliament a bill for the construction of water works and for the doing of acts which would have prevented the efficient removal

of churches, the establishment and maintenance of colleges or schools, the providing of prisons, and the

of the sewage of the town, and have thus indirectly affected the value of property in the borough and the borough fund [Attorney-General v. Wigan, 24th and 25th January 1851, 1 Kay (Chancery), 268]. On the other hand, the court has disallowed expenses incurred in defending the election of a councillor, and also in defending an alderman against charges of misconduct, on the ground that these expenses were not for the public benefit of the inhabitants [The Queen v. The Mayor of Bridgewater, 1839, 10 Adolphus and Ellis, Q.B., 281; and The Queen v. Paramore, 1839, *Ib.* 286]. So also, and on the same principle, the court disallowed the charge against the borough fund of the expense of an inspector of police in prosecuting the publisher of a libel against him [The Queen v. The Mayor of Liverpool, 30th January 1872, 41 L.J., Q.B., 175]; of trying a question as to which of two councillors was legally elected [The Queen v. The Mayor, etc., of Leeds, 31st May 1843, 4 Q.B. Cases, 796; 12 L.J., Q.B., 369]; of defending borough constables against indictments preferred against them, otherwise than when ordered by the watch committee with the approbation of the town council, under section 82 of the act [The Queen v. Thompson, 20th January 1844, 5 Q.B., 477]. The costs of litigation undertaken *bona fide*, and on reasonable grounds, for the defence of the corporate rights, have been sanctioned, though the litigation was unsuccessful [The Queen v. The Mayor, etc., of Tamworth, 24th November 1868, 19 L.T. (N.S.), 433]. But it has been held that a corporation cannot spend its borough funds in the purchase of a gold chain for the mayor, such an article being unnecessary [Attorney-General v. The Mayor, etc., of Batley, 18th March 1872, 26 L.T. (N.S.), 392]. In this case the question seems to have been one of applying the borough fund, so far as raised from rates, in the purchase of the article. Thus the Vice-Chancellor said:—"The money will have to be raised by a number of small payments, contributed by a number of persons of various positions in the social scale, and varying also in their pecuniary means; and it becomes the duty of the court to see that money so contributed is not wantonly spent or wasted. Forms and ceremonies no doubt have their uses, and some persons may be and are perhaps more impressed by them than others. But to suppose that any reasonable human being would pay more respect to a mayor because he wears a gold chain, a chain bought for him out of the rates, a chain which he has not paid himself, and which is not even, therefore, a proof of his own personal solvency, is a supposition beyond the possibility of belief."

The town councils of English boroughs under the Municipal Corporation Act are absolutely prohibited from selling, mortgaging, or alienating their heritable estate without the consent of the Lords Commissioners of the Treasury, or any three of them, and subject to such conditions as they may impose. Leases for a longer period than thirty-one years require similar consent [5 and 6 Will. IV., cap. 76, section 94; 6 and 7 Will. IV., cap. 104, section 2; 8 and 9 Victoria, cap. 18, section 15; and 23 and 24 Victoria, cap. 16, sections 1-7]. The councils of all English boroughs who have not power otherwise to purchase or acquire lands may do so with the consent of the Treasury [23 and 24 Victoria, cap. 16].

In consequence (it is believed) of the decision in the case of The

maintenance of the streets and public thoroughfares of the burgh. These, in so far as not otherwise provided for by subsequent legislation,¹ must, within reasonable limits, still be regarded as proper objects of burghal expenditure.

The common good is also clearly liable for all expenditure necessary in maintaining the burghal establishment, and in protecting the interests of the corporation. It also appears to the writer, that after making due provision for these primary purposes, it may be applied by the council, within the limits of a fair discretion, in promoting the general advantage of the burgh. But grants from the common good to charitable or other benevolent enterprises *beyond* the burgh, do not seem to fall within the category of beneficial expenditure. Nor can payments

Queen v. The Mayor of Sheffield in 1871, the Act 35 and 36 Victoria, c. 91, was passed, to authorise the expense of promoting and opposing bills in parliament to be charged against the borough fund, borough rate, or other public funds or rates under the control of the governing body, subject to various conditions therein prescribed. Reference will afterwards be made to the provisions of that act.

¹ For example, the support of the ministers, and the administration and management of the parochial churches of Edinburgh, are regulated by the Acts 23 and 24 Victoria, cap. 50, 24 and 25 Victoria, cap. 27, and 33 and 34 Victoria, cap. 87. The support of the second minister of Montrose is regulated by the Acts 23 and 24 Victoria, cap. 50, and 33 and 34 Victoria, cap. 87. Provision has also been made in regard to the College and schools of Edinburgh by the Acts 1 and 2 Victoria, cap. 55, and 24 and 25 Victoria, cap. 90. The Education (Scotland) Act, 1872, which transferred the management of all burgh schools from town councils to school boards elected under its provisions, required the town council of each burgh to pay yearly to the school board such sum as it had been the custom of the burgh, prior to the passing of the act, to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge. The town councils of burghs are also authorised by the General Police Acts of 1850 and 1862, when adopted in whole or in part, to apply portions of their common good to the police and improvement of the burgh [See No. 254 of these Observations]; and by the Public Libraries (Scotland) Act, 1867, when adopted in the burgh, to apply a portion of the common good to the support of free libraries established under it. They are now wholly relieved, as has been seen, by the Prisons (Scotland) Act, 1877, from the maintenance of prisons and criminal prisoners [See No. 213 of these Observations, sub-section (1), footnote, pp. 360, 361]; and in many burghs the responsibility for the maintenance of streets is transferred to police commissioners acting under general and local acts.

out of the *capital* of the common good to charitable and benevolent institutions *within* the burgh, be regarded as proper acts of administration, which the court would be likely to sustain, if competently challenged.

2. In Parliamentary Burghs.

228. The magistrates and council of every parliamentary burgh, elected under the authority of the Act 3 and 4 Will. IV., c. 77, have the like rights, powers, authorities, and jurisdiction as are possessed by the magistrates and council of royal burghs; and their rights, powers, authorities, and jurisdiction extend equally over every part of the limits of the burgh. The power of trying for crimes punishable by death or transportation is, however, expressly excluded. The rights, powers, authorities, and jurisdiction conferred by the Act 3 and 4 Will. IV., cap. 77, do not exclude the authority and jurisdiction of any Admiralty Court, or Dean of Guild Court lawfully established, or of the sheriff or justices of the peace of the county over the territory within the boundaries of parliamentary burghs.¹

229. Where there is no parish church within a parliamentary burgh, the notices appointed to be made by the Act 3 and 4 Will. IV., cap. 77, may be given at the principal place of public worship within the burgh.²

230. The position of town-clerks of parliamentary burghs is so far different from that of the town-clerks of royal burghs, as explained in No. 212 of these Observations, that while the lawful right of any town-clerk existing at the passing of the Act 3 and 4 Will. IV., cap. 77, to hold his office of town-clerk, or clerk to the magistrates and council, *ad vitam aut culpam*, is thereby reserved, the magistrates and council are authorised to elect a

¹ Section 30 of 3 and 4 Will. IV., cap. 77. See footnote to No. 232 of these Observations.

² Section 28 of 3 and 4 Will. IV., cap. 77.

town-clerk for the period of one year, without prejudice to his re-election.¹ No councillor, nor the partner in

¹ Section 26 of 3 and 4 Will. IV., cap. 77. See section 11 of 31 and 32 Vict. c. 108, as to the election of the town-clerk of Hawick.

Morrison v. The Magistrates of Greenock, 27th May 1806, referred to by Lord Moncreiff in *Dykes v. The Magistrates of Port-Glasgow*, 2d July 1840, 2 D., 1274 ; 15 F., 1388.

See remarks by Lord Moncreiff on section 26 of 3 and 4 Will. IV., cap. 77, in *Farish v. The Magistrates of Annan* (quoted in footnote to No. 212 of these Observations, p. 347). See also observations by Lord Jeffrey in *Dykes v. The Magistrates of Port-Glasgow*, *supra*. By the original charter of incorporation of Port-Glasgow, confirmed by act of parliament in 1669, the magistrates of that burgh were empowered "yearly to choose, input and output their clerks and other officers as they shall think fit." By another act, passed in 1775, Port-Glasgow was incorporated with Newark, and placed under the management of new magistrates, who were empowered "to appoint a clerk or collector and other officers, and from time to time to remove such clerks, collectors, officer or officers, or any of them, and to appoint others in their stead." The whole appointments of town-clerks from 1775 till the passing, in 1833, of the Act 3 and 4 Will. IV., cap. 77, which created Port-Glasgow a parliamentary burgh, appear to have been made annually and in express terms during pleasure. The appointments of the town-clerk subsequent to 1833 were made in terms of section 26 of 3 and 4 Will. IV., cap. 77, for one year without prejudice to his re-election and lawful rights under it. The Lord Ordinary (Jeffrey) found, in the 5th place—"That the clerk of a burgh of barony is not to be considered as a public officer, in the same sense as the clerk of a royal burgh ; and that the views of public policy or expediency, which appear to have been recognised in the case of *Simpson v. Tod*, in 1824, and in some more recent cases, have little application to such a case as that of the suspender, and are insufficient to control the plain and natural meaning both of the statutes under which the said suspender was appointed, and of the terms in which his successive appointments, and those of all his predecessors, are expressed." In a note to his interlocutor, his lordship made the following observations as to the meaning and effect of section 26 of the act of 1833 :—"The Lord Ordinary has a strong impression that the true construction of the clause in the act of 1833, by which it is declared 'that it shall be lawful' for the new magistrates and councils to elect a town-clerk 'for the period of one year' is, that they have no lawful power to elect for any other period. The councils to which the power of appointment is thus given, it is always to be remembered, were entirely new bodies, and the mere creatures of the statute by which they were called into existence. They could have no official powers, therefore, which were not given by the statute, or at least (if some might have been assumed as plainly incidental and necessary to explicate those that were given expressly) they could have none which were given expressly, except under the qualities and limitations expressly annexed to them in the grant. It appears, no doubt, from the note of Lord Moncreiff in the case of *Farish*, that his lordship had a different impression of the import of this clause ; and therefore the present Lord Ordinary cannot but have some distrust in the opinion he has now expressed, although he thinks it right to observe,

business of any councillor, can hold the office of town-clerk.¹

231. The provisions of the Act 3 George IV., cap. 91 (Sir William Rae's Act), in regard to the annual statement of accounts of the common good;² to the feuing,

—1st, that Lord Moncreiff appears to have (erroneously) supposed that the clause in question occurred in the act for the new regulation of our ancient *royal burghs*, in which case there would have been far stronger grounds for leaning to his construction; and 2d, that the observations made on this case of Farish, when affirmed (upon what may be called a point of form) in the House of Lords, and the remarkable fact of everything tending to countenance Lord Moncreiff's construction of the statute, or view of the general law, having been ordered to be struck out of his interlocutor before the affirmance of its practical result, tend very strongly to weaken that authority. But, in truth," he added, "except for its remote bearing upon some of the grounds of the *fifth* of the preceding findings, the construction of the recent Act, as to the election of new town-clerks, is no way material to the present question, which turns entirely on *the reservation*, in that act, of the rights of those who were already in office when it came into operation, and the only thing *now* to be considered, therefore, is, what was the true tenure of the suspender's office at that period?"

The court adhered, holding that the clerk had no right to be continued in his office *ad vitam aut culpam*, but was liable to be removed at the pleasure of the magistrates; and at the advising Lord Moncreiff said:—"A case very apposite to this was decided some years ago—the case of *Æneas Morison v. The Magistrates of Greenock*, 27th May 1806, where it was laid down, that in the case of royal burghs a town-clerk was to be held as appointed for life, where there was nothing express as to the duration of the appointment, but the contrary in a case of a burgh of barony. The matter was fully discussed in a declarator by the magistrates of Greenock, and the point of law solemnly decided, that the town-clerk of a burgh of barony only held his office during pleasure, the distinction being taken from the case of a royal burgh." The other judges concurred.

See also *Anderson v. Harvey*, 11th March 1837, 15 S., 875; 12 F., 783.

The office of town-clerk in boroughs in England subject to the Municipal Corporation Act, is determinable at pleasure. See section 58 of 5 and 6 Will. IV., cap. 76. The town-clerk has the charge and custody of, and is responsible for, all the charters, deeds, muniments, and records of the borough, or relating to its property, but these must be kept in such place as the council for the time may direct [section 65]. Any town-clerk whose office shall be abolished, or who shall be removed from his office under the provisions of the act, is entitled to adequate compensation, to be assessed by the town council, with an appeal to the commissioners of the treasury, and payable out of the borough fund, for the salary, fees, and emoluments of the office of which he is deprived, regard being had to the manner of his appointment, and his term or interest in the office, and all the circumstances of the case [section 66].

¹ Section 27 of 3 and 4 Will. IV., cap. 77.

² Sections 1, 2, 3, 9, 10 and 12. See Nos. 216 and 226 of these Observations.

alienation, or leasing, for a longer period than a year, of the common good,¹ and to the separate and distinct specification of the purposes for which, the authority by which, and the rate at which, every assessment is levied² apply, without doubt, only to royal burghs. It has been questioned, however, whether the enactments of that statute, in so far as they require accounts to be annually stated of the funds of charities, foundations, or mortifications under the administration of magistrates and town councils, or any number of them, as sole trustees,³ and also in so far as they prohibit the contracting of debt without a previous act of council,⁴ do not apply to other burghs. The preamble of the act expressly limits to *royal burghs* its statement as to the expediency of having accounts of the common good annually stated and exhibited, of regulating the sale or letting of the common good, and of providing for the prevention and redress of wrong in the administration of the common good, and in collecting the cess or any local tax or imposition. But its reference to the expediency of having annual accounts of the funds and administration of charities is broader. "Whereas," it says, "it is also expedient, where the management of the funds of any charity is exclusively entrusted to the magistrates and town council of *any burgh*, "or exclusively to any number of them, that an account should be regularly stated," etc. The enacting clause is in conformity with the statement in the preamble:—"When the magistrates and members of the town council of *any burgh*, or any number of them, are the sole trustees," etc. The act contains no clause defining the meaning of the word "burgh," or limiting it to royal burghs. It has, therefore, been argued that the requirements as to the annual statement of accounts of charities, foundations, or mortifications apply to all

¹ Sections 5, 6, 8, 9, and 12. See Nos. 223 and 226 of these Observations.

² Section 7. See No. 224 of these Observations.

³ Section 4. See No. 216 of these Observations.

⁴ Section 11. See No. 225 of these Observations.

burghs. But it is to be observed, that such accounts are appointed to be annually stated and certified in the manner directed by the act, "distinct from the account relative to the common good and revenues of such burgh," and to "be deposited in the town-clerk's office as aforesaid, at the same time that the annual account relative to the common good of the burgh shall be deposited there," and "be open to the inspection of the burghesses." The penalty of £50 for failure so to state and deposit the annual account of charities is also appointed to be recovered and applied in the same way as the penalty for failure to state and deposit the annual account of the common good is to be recovered and applied. These provisions seem to indicate an intention that the annual accounts of charities shall only be stated and deposited in burghs to which the provisions of the act in regard to the annual accounts of the common good apply, *i.e.*, to royal burghs.

The prohibition against contracting debt without a previous act of council also is not expressly limited to royal burghs. The words of the act are:—"It shall not be lawful for the magistrates or the town council of *any burgh* to contract any debt, grant any obligation, make any agreement, or enter into any engagement which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made on that behalf." Debts or engagements entered into in contravention of this provision are declared to be void and null as against the common good of the burgh, or the succeeding magistrates or town council, without prejudice, nevertheless, to the personal liability and responsibility of the persons by whom the same may have been made or entered into.

The whole act, however, has in practice been regarded as one applicable solely to royal burghs. Its title is "An Act for regulating the mode of accounting for the common good and revenues of the royal burghs of Scot-

land," and the main objects which it was intended to serve seem to have been sufficiently secured since 1833 by the Act 3 and 4 Will. IV., cap. 77, section 31.

By section 31 of the Act 3 and 4 Will. IV., cap. 77, the magistrates and council of every parliamentary burgh, are required, on or before the 15th of October in every year, to make up a distinct account of the affairs of the burgh, which must be kept in the town-clerk's or treasurer's office for inspection, in the same way as the annual accounts of royal burghs are appointed to be made up and kept for inspection.¹ An abstract of each account, with a balance-sheet, containing all necessary particulars, must also be printed and published on or before the 20th of October annually.²

232. The Act 3 and 4 Will. IV., cap. 77, reserves to every person, or class or community of persons, bodies politic, corporate, or collegiate, every right of property within parliamentary burghs which they respectively had or enjoyed before the passing of the act.³

233. When parliamentary burghs have a common good or common property, the magistrates and council seem to possess powers, and to be subject to general rules of administration, in regard to it similar to those which the magistrates and councils of royal burghs possess and are subject to, at common law, with reference to their common good. On this matter reference may be made

¹ See No. 217 of these Observations.

² Section 31 of 3 and 4 Will. IV., cap. 77.

³ Section 33 of 3 and 4 Will. IV., cap. 77. As to the effect to be given to sections 30 and 33 of this act, see the case of *The Magistrates of Peterhead v. The Governors of the Merchant Maiden Hospital*, 20th November 1840, in which it was held with reference to particular deeds and to the municipal history of Peterhead, which was a burgh of barony, that certain properties and the administration of them, and the application of their proceeds for the public good of the burgh, were vested in the feuars, subject to the control of the superior; and that the magistrates and council elected under the Act 3 and 4 Will. IV., cap. 77, had no right, in virtue of the provisions of that act, to such properties, or to the administration of the proceeds thereof [3 D., 99; 16 F., 84].

to what is stated as to the powers of the magistrates and councils of burghs of regality and barony in the administration of their common good.¹ It appears to the writer that the burgesses of parliamentary burghs have the same right at common law to challenge alienations or misappropriation of burgh property that burgesses of burghs of regality or barony have; that a minority of the magistrates and council may challenge the legality of acts of council; and that magistrates and councils may impugn the acts of their predecessors, as has been explained with reference to royal burghs.²

3. In Royal and Parliamentary Burghs.

234. No fine or other penalty is exigible from any person either declining to accept office as a councillor, magistrate, or other office-bearer in the town council of any royal or parliamentary burgh, after his election, or subsequently resigning his office.³

235. All notices or intimations required by the Acts 3 and 4 Will. IV., caps. 76 and 77, to be given or made in royal and parliamentary burghs, or of any meetings or proceedings to be held in the matter of elections in such burghs, must, when not directed to be otherwise given,

¹ See No. 241 of these Observations.

² Sub-section (1) of No. 241 of these Observations.

³ See Nos. 221 and 222 of these Observations.

⁴ Section 26 of 3 and 4 Will. IV., cap. 76; section 24 of 3 and 4 Will. IV., cap. 77.

Previous to the passing of these Acts, it was the practice in Scotland for the town councils of royal burghs to impose fines upon such persons as were elected to public offices, but declined to accept. Of this there are illustrations in the cases of *Wilson v. the Magistrates of Queensferry*, 2d January 1668, Mor., 1835; *Hill v. Hopkirk*, 13th January 1780, Mor., 1995; Hailes, 843; and *May v. Hill*, 2d June 1835 [13 S., 849; 10 F.C., 614]. In the last-mentioned case it was held that the burgh court of Glasgow was entitled to interpose its authority to an act of the town council fining a person who had refused to serve the office of bailie, and to decern for the fine so imposed. Bankton thus states what was formerly the law on this subject,—“Where the charter of erection empowers a corporation to choose officers it impliedly

be made by the town-clerks of the respective burghs.¹ In any parliamentary burgh in which there is no town-clerk, the sheriff-clerk of the county must give the requisite notices.² When a returning officer is required by the Ballot Act to give any public notice, he may do so by advertisements, placards, hand-bills, or such other means as he thinks best fitted to afford information to the electors.³

236. The town-clerks in royal and parliamentary burghs are prohibited from interfering, directly or indirectly, in the election of the magistrates or councillors of the burghs of which they are clerks.⁴

obliges the persons chosen to undergo the charge imposed upon them [B. I., t. 2, section 2].

In England, every person duly qualified who is elected to the office of alderman, councillor, auditor or assessor, and every councillor who is elected to the office of mayor, is bound to accept the office to which he is elected, or in lieu of accepting must pay to the mayor, aldermen, and burgesses such fine, not exceeding £50 in the case of aldermen, councillors, auditors or assessors, and not exceeding £100 in the case of mayors, as the council of the borough may fix by bye-law. From liability to the fine the following persons are exempted, viz., lunatics, imbecile persons, and persons labouring under deafness, blindness, or other permanent infirmity of body; persons above sixty-five years of age, or who have served in such office, or paid the fine of non-acceptance within five years from the date of re-election, military, naval or marine officers in Her Majesty's service on full pay, or officers and persons employed and residing in the royal dockyards, victualling establishments, arsenals or barracks [5 and 6 Will. IV., cap. 76, section 51], and persons enabled by law to make an affirmation instead of taking an oath, or who refuse on conscientious grounds to take any oath or make any declaration required by the Act 5 and 6 Will. IV., cap. 76, or to take upon themselves the duties of such office [section 8 of 6 and 7 Will. IV., cap. 104]. Holders of corporate offices may at any time resign on payment of the fine which they would have been liable to pay for non-acceptance of the same office [*Ibid*]. Officers of inland revenue are exempted by 16 and 17 Vict., cap. 59, section 17, from serving in any corporate or parochial or other public office or employment.

¹ Section 29 of 3 and 4 Will. IV., cap. 76; section 27 of 3 and 4 Will. IV., cap. 77.

² Section 27 of 3 and 4 Will. IV., cap. 77.

³ Rule 46 of the Ballot Act.

⁴ Section 28 of 3 and 4 Will. IV., cap. 76; section 27 of 3 and 4 Will. IV., cap. 77.

In the case of *Dick v. Duff*, 2d March 1821, 20 F.C., 293, a petition and complaint at the instance of certain councillors of the burgh of Elgin, praying for the removal of the town-clerks, on the ground of their having acted during a contested election of a member of parliament as

237. If any magistrate, councillor, town-clerk, sheriff, or other person wilfully contravenes or disobeys the provisions of the Act 3 and 4 Will. IV., cap. 76,¹ or 3 and 4 Will. IV., cap. 77,² he may be sued for the offence in the Court of Session, by any person aggrieved, for the penal sum of £300; which sum, or any smaller sum which may be assessed by a jury in such action, the defender, upon conviction, must pay to the pursuer with full costs of suit. But every such action must be raised within four calendar months after the cause of action has arisen, and notice in writing must be given to the person against whom it is intended to be brought at least one calendar month before the action is raised. The object of the notice is to enable the person to whom it is given to prepare for his defence. It must, therefore, be distinct and specific as to the person against whom the action is to be raised, as to the ground of action, and as to the penalties to be exacted. A notice which does not set forth these particulars does not fulfil the requirements of the statute; and an action following upon it will not be sustained.³ Whenever judgment has been once recovered in such action, the defender is entitled to plead the judgment as a bar to any other action which may be brought against him for the same matter or thing, and the second or subsequent action being thereupon dismissed, the defender is entitled to recover his full costs of suit.⁴

238. In Edinburgh the dean of guild, elected by the guildry, and the convener, elected by the convenery; in Glasgow the dean of guild, elected by the merchants' house, and the convener, elected by the trades' house;

political agents of one of the candidates, whose object they endeavoured to forward by means of their official powers and influence, was dismissed as incompetent, the proceeding not being allowed by the election statutes.

¹ Section 34 of 3 and 4 Will. IV., cap. 76.

² Section 32 of 3 and 4 Will. IV., cap. 77.

³ *Drew v. Maxwell*, 14th November 1854, 17 D., 51; 27 Jur., 3.

⁴ Section 34 of 3 and 4 Will. IV., cap. 76; and section 32 of 3 and 4 Will. IV., cap. 77.

and in each of Aberdeen, Dundee, and Perth, the dean of guild elected by the guildries, are by virtue of such election constituent members of the town councils of these burghs.¹ With these exceptions the offices and titles of dean of guild and convener, and also of deacon, as official and constituent members of the town councils of every royal burgh, were abolished by the Act 3 and 4 Will. IV., cap. 76, sec. 19; but in all royal burghs other than those named where there was a dean of guild at the passing of the act, the duties and functions previously performed by him in the town council or dean of guild court of the burgh, are performed by a member of the council elected by the councillors in the manner already explained.²

In royal burghs where there is no dean of guild, the magistrates are entitled to exercise the authority of dean of guild. Bankton says:—"In some borows there is no dean of guild. In such cases, those matters that belong to the dean of guild court are within the cognisance of the magistrates, with advice of the council, to whose jurisdiction that of the dean of guild is understood to be annexed, when, by the constitution of the borow, no separate guild court is established."³ Erskine says:—"By the usage of several boroughs, proprietors are obliged to keep a foot, or a foot and a half, within the extremity of their several properties. And where the usage is not fixed, the dean of guild, or other magistrate who is charged with the police, appears to be trusted with a discretionary power of directing the buildings within borough, subject to the review of the Court of Session. Clark, 8th July 1760, M., 13172."⁴

¹ See No. 142 of these Observations.

² See No. 145 of these Observations.

³ Bankton's Institutes, B. iv. t. 20, sec. 7.

⁴ Erskine, II. 9, 9. The law as stated by Bankton and by Erskine was recognised by the court in *Scouller v. Pollock*, 24th January 1832, 10 S., 241; *Milne v. Melville*, 27th November 1841, 4 D., 111; *Lammond v. Cumming*, 11th June 1875, 2 Rettie, 784; *Tainsh v. The Magistrates of Hamilton*, 24th January 1877, 4 Rettie, 315. See also the opinion of Lord Deas in *Crawfurd v. The Magistrates of Paisley*, 10th March 1870, 8 Macph., 693; 42 Jur., 350.

The right of every craft, trade, convenery of trades, or guildry, or merchants' house, or trades' house, or other such corporation in royal burghs to elect their own deacons, or deacon-convener, or dean of guild, or directors, or other lawful officers for the management of their own affairs, and the right of every craft, trade, or guildry in parliamentary burghs to elect their own deacons, or deacon-convener, or dean of guild for the management of their own affairs, is not impaired by the Act 3 and 4 Will. IV., cap. 76, or 3 and 4 Will. IV., cap. 77. On the contrary, it is expressly declared that all these bodies are entitled to the free election of the several office-bearers without interference or control on the part of the town council or any of its members.¹

4. In Burghs of Regality and Barony.

239. In burghs of regality, where the magistrates have been in immemorial use to exercise a jurisdiction as to the lining of boundaries similar to that of the dean of guild in royal burghs, the usage has been sustained.²

240. The clerk of a burgh of barony or regality has no right to his office *ad vitam aut culpam*. He holds it only during pleasure.³ This is not altered or affected by the burgh being made a parliamentary burgh.⁴

241. The magistrates and council of a burgh of regality have the same powers as magistrates of a royal

¹ Section 21 of 3 and 4 Will. IV., cap. 76.

Section 21 of 3 and 4 Will. IV., cap. 77.

² *Neilson v. Vallance*, 10th December 1828, 7 S., 182. See also observations by Lord Curriehill in *Tainsh v. The Magistrates of Hamilton*, 24th January 1877, 4 Rettie, 315.

³ *Morrison v. The Magistrates of Greenock*, 27th May 1806, referred to by Lord Moncreiff in *Dykes v. The Magistrates of Port-Glasgow*, 2d July 1840, 2 D., 1274; 15 F., 1388. See footnote to No. 230 of these Observations, pp. 401, 402.

⁴ *Dykes v. The Magistrates of Port-Glasgow*, *supra*. See footnote to No. 230 of these Observations.

burgh have to grant feus of the common good.¹ They may also sell the liferent of superiorities belonging to the burgh for adequate consideration,² but they are not entitled, it has been held, to dispose privately of liferent rights of the superiority of the burgh lands for the creation of freehold qualifications,—such alienations not being necessary for the benefit of the burgh, and being destructive to its jurisdiction, and fitted to give rise to serious legal questions.³ Besides, it was observed, if such alienations were proper acts of management the magistrates should have proceeded by public sale.

(1.) The provisions of the several acts relative to the common good of royal burghs do not apply to burghs of regality and barony, burgesses of which appear to be entitled at common law to call the magistrates and council to account, in the Court of Session, for malversation and mismanagement.⁴ They have been held entitled to challenge alienations of the burgh property,⁵ and mis-

¹ *Cathie v. The Magistrates of Musselburgh*, 30th June 1752, Mor., 2521; *Elchies voce Burgh Royal*, No. 32.

² *Wilson and Others v. Storry and the Magistrates of Paisley*, 21st February 1775, Mor., 2529; 5 Brown's Supl., 629.

³ *Stewart and Others v. The Magistrates of Paisley*, 22d January 1822, 1 S., 261 (N.E., 246).

⁴ Brown's Suppl., *voce* Title to Pursue, vol. v. p. 628.

⁵ *Wilson and Others v. Storry and the Magistrates of Paisley*, *ut supra*. In this case certain burgesses of Paisley, which is a burgh of barony, instituted a reduction of an act of council, and of certain conveyances following upon it, by which the liferent of a superiority belonging to the burgh was sold by private bargain. In defence it was pleaded that neither the burgh in general nor any individual within it was injured by the transaction, and that consequently the pursuers, as burgesses, were not entitled to insist in the action, which was otherwise groundless upon its merits. The court sustained the title of the pursuers, but repelled the reasons of reduction.

Stewart and Others v. The Magistrates of Paisley, 22d January 1822, 20 F.C., 504. In 1816 the magistrates of Paisley proposed to sell to different persons a portion of the superiority which is held directly from the crown, with a view to afford the purchasers qualifications as freeholders in the county of Renfrew. Certain burgesses applied for interdict, and also instituted an action of reduction, on the ground that the superiority was vested in the magistrates merely as administrators of the property of the burgh, and in that character they could not do an

appropriation of ground destined for common purposes by immemorial usage.¹

act which would destroy the burgh as a corporate body and put an end to the privileges of the inhabitants. The court sustained the reduction, holding that the magistrates were not entitled to dispoise the superiority in liferent.

¹ *The Magistrates of Kilmarnock v. The Inhabitants*, 19th December 1776, 5 Brown's Sup., 406; Hailes, p. 738. In this case it was found that the inhabitants of a burgh of barony were entitled to prevent the magistrates from feuing ground belonging to the corporation which had always been used by the manufacturers and inhabitants of the burgh for bleaching, drying, and other purposes. In *Home v. Young*, 18th December 1846, 9 D., 286; 19 Jur., 109, the inhabitants of the burgh of barony of Eyemouth, who had from time immemorial used a bleaching-green and well within the burgh, were found entitled (though not heritors) to defend the subjects against an attempt by the superior to deprive them of the use of their privileges. The privilege conferred upon the burgh of electing magistrates had been in disuse, but the court were of opinion that the superior, in whose favour the burgh had been created and incorporated, and who was the owner of the subjects, came in place of the magistrates as representing the community, and was not entitled to deprive the inhabitants of their privileges. Lord Jeffrey also explained the distinction between servitudes to be established against a stronger third party, and attempted invasions of rights belonging to the community by those who ought to respect and protect them. In *Dyce v. Hay*, 10th July 1849, 11 D., 1266, the court held that an individual could not, by mere usage, acquire a privilege of walking and recreation over the private property of another, but they carefully distinguished that case from the case of an inhabitant of a burgh establishing by usage such a privilege over a part of the territory of the burgh. This distinction was also specially recognised by the House of Lords on appeal (25th May 1852, 1 Macqueen, 311); and in the subsequent case of *Sanderson v. Lees*, 25th November 1859, 22 D., 24; 32 Jur., 14, the Lord President (M'Neill), observed "that the right of the complainer and the other inhabitants is not to be regarded as a servitude right at all. The magistrates held the property all along for the community, but the purposes for which it has admittedly been possessed by the inhabitants are not inconsistent with the right of property in the magistrates. These uses have been co-existent with the property from the first; and the property, as I look upon the case, was in the magistrates for the community for the purposes in question as much as for other purposes." See also observations by Lord Deas in the same case.

As to the identity between the rights of burgesses of burghs of regality and barony on the one hand, and royal burghs on the other, see the observations by Lord Cunningham (Ordinary) in the case of *Home v. Young*, and by Lord Curriehill and Lord Deas in *Sanderson v. Lees*.

Lord Cunningham said, in *Home's case*—"It is farther argued, that various rights are competent to the inhabitants of *royal burghs* over the estates of contiguous proprietors *beyond* the boundary of the burgh, which are not claimable by the inhabitants of *burghs of barony*, or unincorporated villages. In royal burghs, it is said that the territory of the burgh, vested in the magistrates, forms a *dominant tenement*, which does not exist in the case of burghs of barony and ordinary villages. But that

(2.) It was questioned, in the case of *Johnston v. the Stent Masters of Kelso*,¹ whether an inhabitant of a burgh

deduction is altogether fanciful and groundless. In royal burghs, the magistrates are not invested with the estate within the bounds of the burgh as feudal *proprietors*. The burghal territory remains with the crown, and the magistrates notoriously give infeftment as *procurators* for the sovereign. In baronies, again, in which a lower burgh has been erected, the limits of the burgh are generally as well defined as those of a royal burgh; and while the higher fee remains with the baron, the village *tenements* are held under him. If the magistrates of royal burghs, therefore, can be restrained from alienating or misappropriating ground destined for useful and common purposes by long and immemorial usage, it follows, on the same principle, that subject superiors who appoint the magistrates of burghs of barony, may be equally restrained by the inhabitants, and all having interest, from every abuse of their title, in attempting to encroach on ground set apart for the use of the inhabitants, under their jurisdiction and protection, for a period exceeding the years of prescription. In these small communities, the proprietor of the barony is *pater patriæ*, and is as much bound as magistrates, in other cases, to protect and respect the rights and privileges of the inhabitants. Accordingly, the servitude of bleaching, claimed by the inhabitants of Kelso, was rejected by the House of Lords in 1759, not because the town was merely a burgh of barony, but because bleaching was then viewed as a servitude unknown in law; and the House of Lords lately recognised the privilege of taking sand, as belonging to the inhabitants of Hamilton, though that town is only a burgh of regality. Nay, if such rights were claimed, on clear evidence of immemorial possession, for the inhabitants of a large *unincorporated* town (such as Beith, Crieff, Alloa, and many of the parliamentary burghs before their constitution as such by statute), it is difficult to suppose that they could be successfully opposed." See also observations by the Lord President (Boyle), and by Lords Mackenzie, Fullarton, and Jeffrey, in the same case.

In Sanderson's case, Lord Curriehill said—"The question raised in this case is of general importance to the burgesses and inhabitants of burghs, because to almost all our royal burghs, and burghs of regality and of barony, there are attached commons or links, of which the burgesses and inhabitants have, for time immemorial, had the enjoyment for exercise and recreation of different kinds; and the question is now raised, whether the magistrates of these corporations have a discretionary power of depriving these classes of such privileges? I think that this question must be decided in the negative; in respect that such subjects, which have been so used for time immemorial, are not alienable by the magistrates." And Lord Deas said—"This leads to the question, whether, according to the law of Scotland, there can be, by usage, such a dedication of property belonging to a burgh as will exclude that property from being sold by the magistrates, or attached for the debts of the burgh? Now, if this question were open, much might be said upon it. But there can be no doubt that, according to the law and practice of Scotland, such things may and do take place. There is no distinction in this respect between the property of a royal burgh and the property of a burgh of regality."

¹ *Johnston v. The Stent Masters of Kelso*, 25th June 1800, 12 F.C., 426; Mor., No. 1, App., Title to Pursue.

of barony had right to investigate the accounts of the stent masters. The court thought that he had, but as on the merits the defence was clear, the question was not minutely investigated.

(3.) It has been held that it is not *ultra vires* of the magistrates of a burgh of barony to appropriate a part of the common good to the endowment of a parish church in connection with the Church of Scotland, provided such endowment be not extravagant in the circumstances of the burgh.¹

5. In Burghs and Places subject to the General Police Act of 1850 or 1862.

242. Four statutory meetings in each year must be held by the commissioners in such places within the burgh as they may appoint, upon the second Monday of February, May, August, and November, in burghs and places subject to the act of 1850, and upon the second Monday of January, April, July, and October in burghs and places subject to the act of 1862. The act of 1850 fixes twelve o'clock noon as the hour of meeting; but the act of 1862 authorises these meetings to be held at that or at any other hour the Commissioners may fix.²

¹ *Magistrates of Kilmarnock v. Aitken*, 31st May 1849, 11 D., 1089; 21 Jur., 416. In deciding this case, Lord Fullerton said:—"I certainly do not think that the town council could have legally bound the corporation to supply the deficiencies of the funds required for the support of a dissenting congregation. I think there is this particular and manifest distinction between dissenters and the Established Church. A corporate body, like a burgh, created for the benefit of the inhabitants, may, I think, lawfully bind itself, through the medium of its legal organs, to assist and maintain a religious establishment in unison with that recognised by the law of the land; because that is truly a public object, and must be so dealt with by the courts of the country. But the endowment of a dissenting church, however in accordance with the private sentiments of the administrators of the burgh for the time, can be viewed by us in no other light than as an appropriation of the burgh funds to a private object, which is clearly *ultra vires* of such administrators.

² Section 42 of the General Police Act of 1850.

Section 59 of the General Police Act of 1862.

243. Within forty-eight hours of the receipt of a written requisition stating the object of the required meeting, and signed by two commissioners, the clerk must call a special meeting, to be held within four days after the requisition. Special meetings must be convened by written or printed summonses given to each commissioner personally, or at his dwelling-house, or place of business, at least twenty-four hours before the time of meeting. The summonses must, under the act of 1850, contain a copy of the requisition. Under the act of 1862, they must either contain a copy of the requisition or state the purpose of the meeting.¹

244. No rules or regulations can be adopted or carried into execution by any special meeting, which tend to alter or annul rules or regulations made at any of the four statutory meetings.²

245. The commissioners present at any special or statutory meeting may adjourn to any other day, hour, and place within the burgh,³ and are required by the act of 1850 to defray their own expenses at all meetings.⁴ The act of 1862 contains no provision as to expenses.

246. The commissioners may appoint committees of their number, either to report on the matters remitted to them, or to carry the various purposes of the acts into execution; may delegate to such committees the powers competent to themselves, in whole or in part, in regard to the subject of the remit; and may name the convener and fix the number of members who shall form a quorum of the several committees. Each committee is presided over by its convener, who has a deliberative, and in case

¹ Sections 43 and 41 of the General Police Act of 1850.
Sections 60 and 58 of the General Police Act of 1862.

² Section 44 of the General Police Act of 1850.
Section 61 of the General Police Act of 1862.

³ Section 45 of the General Police Act of 1850.
Section 62 of the General Police Act of 1862.

⁴ Section 46 of the General Police Act of 1850.

of equality, a casting vote, and who may convene its members by notices in such way as he may think most convenient.¹

247. The commissioners must appoint a clerk for keeping the books and records of the proceedings of the commissioners and their committees,² and may allow him a reasonable salary. The records must contain accurate minutes of the proceedings and orders of the commissioners and their committees, and, when signed by the preses of each meeting, they, or any copy or extract therefrom authenticated by the signature of the clerk, are received as evidence in all courts in any case or matter concerning the act of 1850 or 1862.³ The act of 1850 appoints the records to be open to the inspection of all persons interested, without payment of any fee, and imposes upon the clerk the duty of giving certified copies or extracts therefrom, when required, to all persons demanding the same, upon payment of such reasonable sum as the commissioners may fix, not exceeding one shilling for every three hundred words. The act of 1862 is silent on this subject.⁴

248. No clerk to the commissioners, nor his partner, nor any person in the employment of the clerk or of his partner,

¹ Section 47 of the General Police Act of 1850.

Section 63 of the General Police Act of 1862.

As to the powers of committees, under authority delegated by the general body of commissioners to do acts which the statute directs the commissioners themselves to do, see *Thomas v. Elgin*, 4th July 1856, 18 D., 1204; 28 Jur., 590. In this case the Perth Local Police Act, 2 Vict., cap. 43, empowered the commissioners to appoint committees "for carrying the purposes of the act into execution," and for that purpose to delegate their powers to them. It was held that the paving committee, to whom the powers of the commissioners had been delegated, had no power to order proprietors to repave a street, but only to see to the decrees pronounced by the commissioners.

² Section 51 of the General Police Act of 1850.

Section 67 of the General Police Act of 1862.

³ Section 54 of the Act of 1850.

Section 70 of the Act of 1862.

⁴ Section 51 of the Act of 1850.

can act as agent or solicitor in the trial of any offence under the acts committed within the burgh. Contravention of this provision disqualifies the clerk from holding any office under the act, and from acting as a commissioner.¹

249. No person appointed clerk, nor his partner, nor any person in the employment of the clerk or his partner, can be treasurer, or in the service or employment of the treasurer or of his partner, or act as deputy of the treasurer, or otherwise, or in any manner officiate for the treasurer. Contravention of this provision subjects the offender, for every offence, to the forfeiture and payment of £100 to any person who sues for the same. The penalty is recoverable with full expenses in the same manner as the other penalties imposed by the act of 1850 or 1862 may be sued for and recovered.²

250. Besides the special provisions of the acts of 1850 and 1862, relative to the clerk, already noticed, both acts empower the commissioners to appoint, at such salaries as they shall judge meet, clerks, treasurers, collectors, surveyors, and all other persons whose appointment is not otherwise provided for, to be employed in the execution of the respective acts, and to remove and suspend such clerks, treasurers, collectors, surveyors, and other persons at pleasure, and to make orders and regulations for their government.³ The commissioners are also required by the act of 1862 to appoint a proper person to be clerk of the police court, who shall hold office only during pleasure, and such person, it is declared, may be

¹ Section 52 of the General Police Act of 1850.

Section 68 of the General Police Act of 1862.

In the case of *Muckarsie v. Walker*, 25th June 1831, 9 S., 804 ; 6 F., 517, a party was subjected in the penalty prescribed by the General Road Act, 4 Geo. IV., cap. 49, section 11, for acting both as clerk and treasurer, though nominally holding only one of the offices.

² Section 57 of the General Police Act of 1850.

Section 73 of the General Police Act of 1862.

³ Section 48 of the General Police Act of 1850.

Section 64 of the General Police Act of 1862.

the clerk to the commissioners.¹ It has been held, in *Hamilton v. the Police Commissioners of Dunoon*, that under these provisions the clerk has no right to his office *ad vitam aut culpam*, but may competently be elected for one year;² and in deciding that case the Lord Presi-

¹ Section 436 of the General Police Act of 1862.

² *Hamilton v. Police Commissioners of Dunoon*, 13th June 1871, 9 Macph., 826; 8 Scot. Law Rep., 561. This case is fully explained in the observations of the Lord President at the advising:—"The Lord Ordinary 'finds that, at the meeting of the police commissioners for the burgh of Dunoon, held on the 26th October 1868, the pursuer was elected clerk to the commissioners for a year from that date, at a salary of £40: Finds that on the expiry of that year, the appointment to the pursuer was not renewed for any specific period, but that he was continued as clerk, under an interim arrangement, until that arrangement was put an end to, in terms of a resolution passed at a meeting held on the 17th January 1870.'—His lordship goes on to find that the commissioners had reasonable cause for resolving not to continue the pursuer in the office of clerk. I do not consider it necessary to go into that. From October 1869 there was a complete dispute as to the nature of the office. The pursuer insisted that he held the appointment for life, while the commissioners continued him in office under an interim appointment. The question really is, Can the pursuer defend his possession of the office, on the ground that he was appointed for life? or, are the commissioners justified in maintaining that he was appointed for one year? The first point is the construction of the General Police and Improvement Act. The pursuer says that, under sec. 67, it is unlawful for the commissioners to appoint a clerk on any other tenure than for life. The words of sec. 67, when read without reference to other sections, give no countenance to any such notion. It enacts that 'the commissioners shall appoint a clerk for keeping the records of the proceedings and orders of the commissioners and their committees, and being signed by the preses of each respective meeting, or any copy or extract therefrom, authenticated by the signature of the clerk, shall be received as evidence in all courts whatsoever in any case or matter concerning this act.' No doubt the clerk to a body of commissioners, whose proper and chief duty is to record their proceedings, is in a certain sense a public officer. But there is no rule in common law that the office is necessarily *ad vitam aut culpam*. On the contrary, the tenure depends on the circumstances of the appointment. But the pursuer says that sec. 67 when contrasted with other sections which deal with the tenure on which certain other offices are to be held, clearly shows that the clerk can only be appointed *ad vitam aut culpam*. The 436 section is referred to as an instance,—'The commissioners shall appoint a proper person to be clerk of the police court, who shall hold office only during their pleasure, and such person may be the same person who is clerk to the commissioners,' etc. Here the provisions of the statute are imperative. The commissioners cannot make an appointment of clerk to the police court for life, nor for a definite period. But does it follow that because the statute is silent in regard to the office of clerk to the commissioners that it must necessarily be a life office? We cannot from these other clauses construe sec. 67 as from its silence enacting that the clerk must

dent (Inglis) expressed an opinion, in which the other judges concurred, that a clerk might be appointed for a definite term,—presumably a term of years.

necessarily be appointed for life. The very nature of the appointment, and the duties which the clerk has to discharge, would make it improbable that the legislature would tie down the commissioners to a life appointment. It is highly expedient that the appointment should be for a time, in order to give the commissioners an opportunity of revising the duties, salary, and conditions of the office. It appears to me that this is precisely the sort of discretion intended to be given by sec. 67. I have no doubt, on the first point, that it is perfectly lawful to appoint a clerk for a definite term. The next question is, did the commissioners make the appointment for a year? I am satisfied, in point of fact, that what passed at the meeting was that Mr. Hamilton was appointed clerk for a year." Lord Deas said,—“The first question here, which is certainly of general importance, is, Whether a clerk to a body of commissioners under the General Police and Improvement Act can be appointed otherwise than for life? I am of opinion with your lordship, that there is no incompetency. The second question is, Whether the pursuer was appointed for life? The minute of appointment is ambiguous. It was mainly to clear up this ambiguity that a proof was allowed. The proof has branched out into all sorts of irrelevant matter; but so far as it applies to the *res gestae* it shows that it was not intended by the words of the minute that the appointment was to be for life. The only other question that remains is whether there was reasonable cause for the pursuer's removal. I agree with the Lord Ordinary, that even if he had been appointed during the pleasure of the commissioners, he could not be capriciously removed without due notice. But he was not taken unawares. An appointment for a year is itself notice of its termination. When the year was about to terminate, the commissioners did not at once hold him to be out of office, but elected him *ad interim*. Their conduct was so reasonable and deliberate that I do not know that it is necessary to find that there was any cause of complaint against Mr. Hamilton. But it is quite evident that there were disputes of a serious character between Mr. Hamilton and the commissioners." Lords Ardmillan and Kinloch concurred.

It has since been held by Lord Rutherford Clark in the case of Wright v. The Police Commissioners of Lockerbie, 1st July 1876 (not reported), that it is *ultra vires* of the commissioners to appoint a clerk *ad vitam aut culpam*. The facts of this case, and the grounds of the Lord Ordinary's judgment, are stated in the following note to his interlocutor:—“The purpose of this action is to have it declared that the pursuer was appointed *ad vitam aut culpam* to the office of clerk to the commissioners of police of Lockerbie, conform to their resolution, dated 23d April 1875. The burgh of Lockerbie was created under 25 and 26 Vict., cap. 101. It need hardly be said that the powers and duties of the commissioners of police, as well as the right of any clerk whom they may appoint, must be regulated by that statute. On the 23d April 1875, the then commissioners of police appointed the pursuer to be their clerk ‘*ad vitam aut culpam*, that is to say, during his life and good behaviour.’ The annual election of commissioners took place on the 21st February 1876, and shortly thereafter the commissioners rescinded the

251. Accounts of all heritable and moveable property vested in the commissioners showing the nature of the property, and of all money received and disbursed, and

pursuer's appointment, on the ground that it was beyond the power of the commissioners. The pursuer has raised the present action to declare the validity of his appointment, and to reduce the rescinding resolution. By the 67th section of the act, the commissioners are required to appoint a clerk "for keeping the record of the proceedings of the commissioners and their committees." The office which the pursuer claimed is the office created by this section of the statute, and the duties of it seemed to be limited to the matters therein mentioned; but it is probable that in addition to the discharge of these duties, the clerk may advise the commissioners in the matters which come before them. The pursuer does not maintain that the commissioners were bound to make the appointment *ad vitam aut culpam*, but only pleaded that they were entitled to do so if they chose, and that having made the appointment, it was binding upon their successors. He founds on the case of Hamilton (*supra*) as deciding—(1) That the 64th section of the statute does not apply to an office created by the 67th; and (2) that such an appointment may be made for a term of years. From this he argues that it might be made *ad vitam aut culpam*. The defenders, on the other hand, maintain that the 64th section related to all clerks whom the commissioners may appoint, including the clerk appointed under the 67th, and contend that the commissioners can only make the appointment during their pleasure. The view which they take of the case of Hamilton is that it was decided on the ground that the appointment was made for a year only, and that any opinions which were expressed to the effect that the clerk might be appointed for a term of years were *obiter*, and not necessary for the decision. They further maintain that even though the 64th section does not apply, the resolution of the 23d April 1875 was *ultra vires*. If the point were open the Lord Ordinary would be disposed to hold that the 64th section is of universal application. It is the introductory section of that part of the act which relates to the powers and duties of commissioners. It includes clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not otherwise provided for; that is to say, one set of persons whose appointment is specially provided for, and another set whose appointment is not specially provided for. The 67th section deals with the appointment of a clerk to perform a certain function, and the 69th with the appointment of treasurers and collectors. But the purpose of these sections, as distinguished from the 64th, which confers and defines the power, is to require the exercise of the power by the appointment of certain officers for the due performance of the work of the burgh. It is true that the 69th section enacts that the appointment of the treasurer and collector shall be during pleasure, and that the 67th is silent on this matter, but that difference cannot, it is thought, make either the one or the other independent of the 64th. It was urged by the pursuer that the office created by the 67th section was to be assimilated to the office of the town-clerk of a royal burgh, and that it could not be the intention of the legislature that the clerk of a police burgh was to hold his office at the pleasure of the commissioners. It appears to the Lord Ordinary that this was little more than an assumption. It was not urged that the appointment must be made in such terms as to give the clerk the same

all orders and proceedings of the commissioners are required by the act of 1850 (section 59) to be kept in books by the clerk. The act of 1862 (section 75) requires similar

tenure of office as belongs to a town-clerk. The argument went no further than that it was competent to do so, or, in other words, that it lay with the commissioners to decide whether the appointment should be held at pleasure, or for a term of years, or *ad vitam aut culpam*. But this is to distinguish it altogether from the office to which it is assimilated; for it was conceded that the clerkship of royal burghs was a public office which the town council must fill up, and to which they could not appoint during their own pleasure. The office of town-clerk in a royal burgh is one of long standing, and has grown up under the common law. It is generally understood that it is held *ad vitam aut culpam*, though it cannot be said that the question has been definitely settled, at least in the sense that a clerk could, like a minister or parochial schoolmaster under the old law, hold the office after he had ceased to be capable of discharging the duties belonging to it. But it is one of a peculiar character, and does not exist in all burghs. For the case of Dykes (2 D., 1274; 15 F., 1388) shows that the clerk of a burgh of barony, or of a parliamentary burgh, does not, and may not hold his office *ad vitam aut culpam*, but may hold it at pleasure only. If this be so, it does not appear in any way anomalous that the clerk to be appointed to keep the records of the proceedings of the police commissioners and their committees shall be appointed during the pleasure of the commissioners; or in other words, that the 64th section shall be held to specify the powers of the commissioners in making such an appointment. But it is doubtful whether this question is open. In the case of Hamilton, a plea founded on the 64th section was repelled in *hoc statu*, and the Lord Ordinary indicated an opinion that that section did not apply to the appointment required to be made under the 67th. The interlocutor was affirmed, and although the decision of the case ultimately turned on the fact that the pursuer had been appointed for no more than a year, the opinion of the Lord President, in which the Court concurred, indicates that he held that the appointment could be made for a term of years. If it had been clear that the judgment of the Court had finally repelled the plea founded on the 64th section of the act, the Lord Ordinary would not have thought it proper to enter upon it for the second time; but as it may be regarded as uncertain how far the Court meant to deal with that plea, he has thought it right to express the opinion on which, as an individual judge, he would have acted. Assuming that the 64th section does not apply to the clerk appointed under the 67th, the next question is, whether the commissioners had power to appoint the pursuer to the office *ad vitam aut culpam*, so that he might hold it and perform its duties irrespective of the will of the commissioners. On the one hand, the pursuer claimed right to hold office so long at least as he was able to discharge its duties; on the other hand, the defenders contended that the commissioners could give him no such right, and, besides, that he was no better than a servant who might be removed from office, however long the contract endured, although the commissioners, as his employers, might make themselves liable in damages for breach of contract. As the question related to the powers of the commissioners, it is necessary in the first place to ascertain what they did. The pursuer was not very clear as to

accounts of property and of money received and of money disbursed to be kept in books by the treasurer or collector, as the commissioners may appoint. The books of accounts and proceedings required by the act of 1850 to be kept by the clerk, and the books of accounts required by the act of 1862 to be kept by the treasurer or collector, may be inspected and perused at all seasonable hours, and copies or extracts taken therefrom, without fee or reward, by persons assessed, and also by persons entitled to money due and owing on the credit of such assessment. Persons in whose custody or power such books are, and who refuse to allow them to be inspected, and copies or extracts from them to be taken, are liable in a penalty not exceeding £10. Any person assessed who is dissatisfied with any accounts, or with any items or articles

the legal effect of the resolution under which he was appointed, but ultimately he seemed to admit that it must be construed as meaning that he should hold his office for life or good behaviour, but only so long as he could discharge the duties of it. He further admitted that if there was any ambiguity in the resolution by which he was appointed, the decree must be qualified according to the construction which he now puts on the appointment. It is not in favour of the validity of the appointment that there is uncertainty as to its meaning, and that the pursuer cannot ask decree without an important qualification. According to its natural meaning, an appointment to a public office *ad vitam aut culpam* gives the holder a right to retain it during his lifetime and good behaviour, irrespective of his capacity to discharge the duties of it. Such is the case with respect to a parish minister, and, until recent legislation, with respect to a schoolmaster. If the town-clerk of a royal burgh cannot hold his office when he becomes incapacitated, the consequence may be that he holds his office on a different tenure; but it is plain that whatever may be the construction which is put on an appointment *ad vitam aut culpam*, it excludes the power of removal for reasonable causes, consisting neither in *culpa* nor in incapacity. An appointment of this intermediate class is known to the law, as for instance in the case of a burgh schoolmaster (Montrose, M., 13118), and of a session-clerk (M., 13126). The appointment of the pursuer is of such a kind that, if legal, he could not be removed from his office, however desirable in the interests of the burgh his removal might be, and, according to one construction of it, he might retain his office even though he could not discharge the duties of the office. The Lord Ordinary is of opinion that the commissioners were not entitled to appoint the pursuer on such a footing as to give him right to retain his office after he had become incapacitated. It has been said that public offices might be held on such a tenure, but such an appointment can be only justified by inveterate usage. To give a man a title to hold an office when he is no longer fit for it is repugnant to common sense, and in the opinion of the Lord Ordinary is beyond the

contained therein, may complain against the same by petition to the sheriff, specifying the grounds of objection, and the sheriff is required to hear and finally determine the matter of the complaint.

252. Previous to the statutory meeting in February of each year, the commissioners in burghs and places subject to the act of 1850 must cause to be made out an accurate account of all the moneys received and expended in the execution of the act, showing from what sources the moneys have been received, and to what purposes they have been applied. As soon as the account has been audited by the persons whom the commissioners

powers of the police commissioners. Whether the pursuer's appointment, according to its true construction, does or does not give such a title, is a matter of uncertainty. The pursuer does not maintain that it does, and, as has been seen, he expressed willingness to submit to a qualification of the decree which he asks. But this very uncertainty seems to the Lord Ordinary to invalidate the appointment. He thinks that an appointment, in order to be legal, must be supported according to the terms in which it is made, and that it cannot be sustained by introducing qualifications or limitations in the decree. But, further, the Lord Ordinary is of opinion that the appointment was beyond the powers of the commissioners, even though it should be qualified by the condition that it should cease when he became incapacitated. Many reasons short of fault may make it necessary for the advantage of the community that he should be removed. To place the clerk in such a position as to make his title superior to any such considerations appears to his lordship beyond the powers of the commissioners. An appointment *ad vitam aut culpam*, even with the qualification above referred to, is one of an exceptional kind. There is nothing in the duties of the clerk which require that such an appointment should be made. It might give rise to serious public inconvenience, and in the absence of express statutory authority, the Lord Ordinary thinks that the commissioners have no power to make it. It was urged by the pursuer that if the appointment might be made for a term of years, it could also be made for life. The Lord Ordinary is not satisfied that this is sound, and that an appointment for a term of years would mean the same thing during the period for which it was made as an appointment *ad vitam aut culpam*. Assuming the holder to be capable of discharging the duties of the office, the latter appointment excludes every cause of removal except that of *culpa*, which it is thought an appointment for a term of years would not do." It is unfortunate that the question thus raised was not carried farther, and decided in the Inner House. If it is legal to elect a clerk for a term of years, must his appointment be limited to a fixed period short of the term of life, and if so, upon what grounds?—the appointment being always dependent on good behaviour, and the ability of the clerk to perform the duties of his office.

must at their statutory February meeting appoint for the purpose,¹ it must be signed by two of the commissioners and the clerk, and be deposited with the clerk, who must forthwith cause to be printed and inserted in one or more newspapers published or circulated in the burgh an authenticated abstract of the account, and permit any person assessed under the act to inspect and examine the account at all seasonable times, without payment of any fee.² In burghs and places subject to the act of 1862 the commissioners must, previous to their statutory meeting in July of each year, cause to be made out an accurate account of all the moneys received and expended in the execution of the act for the year ending on the 15th day of May immediately preceding the statutory July meeting. The account must show the sources from which the moneys have been received, and the purposes to which they have been applied; and so soon as it has been audited by the professional auditor whom the commissioners must appoint annually, it must be laid before the statutory meeting in July, and be signed by the preses and the clerk. The account must then be deposited with the clerk, who must forthwith cause an abstract of it to be printed, and permit any person assessed under the act to inspect and examine the account at all seasonable times without payment of any fee.³

As regards the audit of the annual accounts the act of 1850⁴ requires the auditors to attend, as soon as conveniently may be after the annual meeting of the commissioners in February, at the office of the commissioners, or at some other convenient place appointed by them, and from time to time proceed with the audit. The commissioners must lay before the auditors the accounts for the year, accompanied with proper vouchers, and all books, papers and writings in their custody or power

¹ These auditors may consist of two or more persons, not commissioners.

² Sections 60 and 61 of the General Police Act of 1850.

³ Sections 76 and 77 of the General Police Act of 1862.

⁴ Section 62 of the General Police Act of 1850.

relating thereto. Any person interested in the accounts, either as a creditor or as a ratepayer, may be present at the audit by himself or his agent, and may object to any part of the accounts. If the accounts be found correct the auditors must sign the same in token of their allowance thereof; but if the auditors think there is just cause to disapprove of any part of the accounts, they are required to make such abatements from, or alterations of, the accounts as they may consider just. In either case, they must ascertain and fix the balance arising on the accounts. Should the commissioners be dissatisfied with the result of the audit, they may appeal to the sheriff within fourteen days from the date of the ascertainment of the balance, and his decision is final; but unless they so appeal the balance as fixed by the auditors is final and conclusive, and not subject to review.¹ The act of 1862² simply requires the commissioners to deliver to the auditor, within one month after the 15th of May annually, all the accounts, together with their books and vouchers. The auditor must then audit the accounts, and either make a special report thereon, or simply confirm them. The report or confirmation must be read along with the accounts at the statutory meeting of the commissioners in July.³

253. The magistrates of police of burghs under the General Police Act of 1850 or 1862, or any one or more of them have jurisdiction in, and power to take cognisance of, all crimes, offences, misdemeanours, and breaches of the police regulations contained in these acts respectively, or of any bye-law made in virtue of the police provisions of these acts, and of any other crime or offence which is punishable by public general statute or common law, and is within the jurisdiction of the magistrates of any royal burgh; and have also such and the like jurisdiction within such burgh as any magistrate or dean of guild of a royal burgh has by the law of Scotland within

¹ Section 62 of the General Police Act of 1850.

² Section 78 of the General Police Act of 1862.

³ Section 78 of the General Police Act of 1862.

the burgh in or for which he acts as such magistrate or dean of guild.¹ The act of 1850, however, declares that no jurisdiction thereby conferred shall exclude the jurisdiction of any court of guild, where the case shall, in the first instance, have been brought before or taken up by such court of guild.² And the act of 1862 enacts that no jurisdiction thereby conferred shall exclude the jurisdiction of any sheriff or court of guild, where the case shall, in the first instance, have been brought before or taken up by such sheriff or court of guild.³

254. When the provisions of the General Police Act of 1850 have been adopted in any burgh possessed of free income arising from the common good, after meeting the interest of any debt due by the burgh, and also the necessary outgoings of the burgh, the town council are required to contribute annually from the common good, towards the purposes of the act, such a reasonable proportion as they may think just, having due regard to the extinction of the capital of the debt. Any six or more inhabitants liable in assessment under the act may, by notice in writing, require the amount of contribution to be submitted to the decision of the sheriff, who must thereupon repair to the burgh and inquire into all facts and circumstances which he may deem material, taking in writing the statements of parties, and such evidence as he thinks necessary, and decide as to the amount of contribution to be paid from the common good. This decision must be recorded in the books of the burgh, and also in the books of the commissioners. In the event of any change of circumstances operating either towards the increase or diminution of the free income of

¹ Section 345 of the General Police Act, 1850.

Section 408 of the General Police Act, 1862. *Tainsh v. The Magistrates of Hamilton*, 24th January 1877, 4 *Rettie*, 315. In this case it was held by Lord Curriehill that magistrates of police of a burgh of regality which had adopted the General Police Act, 1862, possessed the powers and jurisdiction relative to buildings pertaining to the magistrates or dean of guild of a royal burgh.

² Section 389 of the General Police Act, 1850.

³ Section 438 of the General Police Act, 1862.

the burgh, the town council or the inhabitants may, after the expiration of three years from the date of the first or any subsequent decision by the sheriff, propose an amendment or rectification of the existing contribution ; and if the council and the inhabitants disagree as to the amount, the sheriff must again decide. The decision of the sheriff in all such cases is final, and not subject to review.¹ Such contributions as may be either agreed to or fixed by the sheriff are recoverable by the same process as debts due from the common good of burghs may by law be recovered.²

The General Police Act of 1862 enacts that when its provisions, or any part of them, have been adopted in any burgh possessed of free income arising from the common good, after meeting interest of debt and necessary outgoings, the town council may annually contribute such reasonable proportion towards the police purposes of the act as they may think just, having due regard to the extinction of the capital of the debt. The sheriff has no power under this act to interfere with the discretion of the council ; and the act provides that nothing contained in it shall prejudice the rights of the creditors of the burgh, secured by local acts of parliament or otherwise ; and farther, that the adoption of the act, in whole or in part, shall not relieve the common good of any burgh from payment of any sum which the burgh is bound by any local act to contribute towards the police expenses of the burgh.³

6. In Royal and Parliamentary Burghs, Burghs of Regality and Barony, and Burghs and Places subject to the General Police Act of 1850 or 1862.

255. The magistrates and councillors of royal and parliamentary burghs, and burghs of regality and barony, and

¹ Section 65 of the General Police Act, 1850.

² Section 66 of the General Police Act, 1850.

³ Section 95 of the General Police Act, 1862.

the commissioners of police in burghs and places which have adopted the General Police Act of 1850 or 1862, are public trustees; and as such are subject to the liabilities, responsibilities, and disabilities imposed at common law upon trustees and persons in fiduciary positions. They are bound, in Scotland as in England,¹ to maintain a position of absolute disinterestedness, and to enter into no transaction in which their own personal interest may conflict or come into competition with that of the estate under their administration. They cannot, therefore, in their fiduciary character, legally enter into contracts or transactions with themselves as individuals. So absolute is this rule, that the court will allow no investigation into the fairness or unfairness of the transaction. It will be held to be enough that the parties interested object.² "It is a rule of universal application," said Lord Chancellor Cranworth,³ "that no one having such [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, *or which possibly may conflict*, with the interests of those whom he is bound to protect." Mr. M'Laren still further generalises the

¹ Tudor's Leading Equity Cases (4 Edn.), vol. i., pp. 148-176; vol. ii., pp. 240-264.

² York Buildings Company v. Mackenzie, 8th March 1793, Mor., 13367; reversed on appeal, 18th May 1795, 3 Paton's App., 378, 579; 4 Dow's App., 330; 8 Brown's Par. Cas., 42; 3 Ross, Lead. Cas. (Com. Law), 305. In this case Mackenzie, while he filled the office of common agent in the sale of the estates of the York Buildings Company, which had become insolvent, bought a portion of these estates at a public judicial sale; and though he remained in possession for over eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet the House of Lords held that, filling as he did an office which made it his duty both to the company and their creditors to obtain the highest price, he could not put himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible. The sale was therefore set aside. Taylor v. Watson, 20th January 1846, 8 D., 400; 3 Ross, L.C. (Com. Law), 329; Perston v. Perston's Trs., 9th January 1863, 1 M.P., 245.

³ Blaikie v. Aberdeen Railway Company, 19th November 1851, 14 D., 66; reversed 20th July 1854, 1 Macq. App., 461; 17 D., H.L., 20; 26 Jur., 622; 3 Ross, L.C. (Com. Law), 338.

statement of the principle.¹ “Of *all* engagements,” he says, “in which the trustee (or other functionary having a delegated duty to perform) as an individual enters into stipulations with himself in his fiduciary character,—it may be predicated that he has a personal interest ‘conflicting or which may conflict’ with that of the trust.” Hence we deduce the more general rule that trustees are under a disqualification from entering into any personal transaction with the trust.

256. While such is the rule at common law, various general acts contain provisions on the subject which are frequently incorporated with local acts.² In some cases also local acts contain special provisions which carry the principle further than the common law does.³

¹ Law of Trusts, 213; Law of Wills and Succession, vol. ii., pp. 170 and 346-358.

² The Companies Clauses Act (8 and 9 Vict., c. 17) sections 88 and 89. Section 88 enacts that no “person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being entrusted in any contract with the company, during the term he shall be a director.” Section 89 enacts, that “if any of the directors at any time subsequent to his election accept or continue to hold any other office or place of trust or profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company . . . then in any of the cases aforesaid the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director.”

The Commissioners Clauses Act, 1847 (10 and 11 Vict., c. 16), section 9 of which enacts that “any person who at any time after his appointment or election as a commissioner shall accept or continue to hold any office or place of profit under the special act, or be concerned or participate in any manner in any contract, or in the profit thereof, or of any work to be done under the authority of such act, shall thenceforth cease to be a commissioner, and his office shall thereupon become vacant.” But section 10 provides “that no person being a shareholder or member of any joint-stock company established by act of parliament shall be prevented from acting as a commissioner, by reason of any contract entered into between such company and the commissioner.”

³ The Edinburgh Municipality Extension Act, 1856, for example, enacts, by section 23, that “it shall not be lawful to employ any magistrate or councillor, or the partner in business of any magistrate or councillor, to furnish goods ordered by the magistrates and council, or to execute any of the public work under their superintendence; and, farther, it shall not be lawful to appoint any magistrate or councillor to

257. The General Police Acts of 1850 and 1862 provide that no commissioner shall directly or indirectly derive emolument or profit from any business or work performed by him under these acts, nor be capable (while he holds office as a commissioner) of enjoying any office of profit established by virtue of either act, or while he has any interest in any contract relating to the execution thereof, nor be capable of standing as a candidate for any such office, or be a competitor for any such contract, except contracts entered into with any chartered or joint-stock company of which he may be a partner.¹

258. As regards these statutory provisions it would

any office of emolument in the gift of the magistrates and council until the expiration of twelve months after he shall have ceased to be a member of council."

The Edinburgh Police Act (11 and 12 Vict., c. 113) provided by section 24 that "no general or resident commissioner should be entitled to contract with the commissioners for goods or furnishings, or to do work for them, or be concerned, directly or indirectly, in any contract with them, or participate in the profits thence arising." In case of contravention it enacted that "he shall not only forfeit and pay the sum of £100 sterling for each offence, to any person who shall sue for the same . . . but shall also cease to be a commissioner . . . and all contracts made in contravention hereof shall be void and null." It was held, in *Deas v. Murray*, 26th June 1851 [13 D., 1236], that this section excluded the claim for remuneration by a medical man, who was also a general commissioner, who had on the employment of the inspector of lighting and cleaning investigated and given evidence as to certain nuisances, with a view to their removal. At the advising Lord Cockburn said, "Had the commissioners employed one of their number as law agent he would clearly have fallen under the clause, and I see no distinction between that case and the present."

¹ Section 40 of the General Police Act of 1850.

Section 57 of the General Police Act of 1862.

The General Police Act, 3 and 4 Will. IV., cap. 46, contained a clause similar to sections 40 and 57 respectively of the General Police Acts of 1850 and 1862, and it was applied in *Haining v. The Police Commissioners of Dumfries*, 16th March 1861, 23 D., 755. In that case the commissioners of police of Dumfries acting under it entered into a contract for furnishing clothing to the police force with one of their own number, who had lodged estimates along with other tradesmen in answer to an advertisement by the commissioners. One of the competing tradesmen brought an action of reduction of the contract, with conclusions for damages. The Court held that he had a good title to sue for damages, but the question of his title to sue the reduction was reserved till the merits came to be disposed of.

seem that where they fall short of the common law rule by prescribing a penalty for contravention, *e.g.*, the loss of office, the court will apply the principles of the common law and set aside the transaction. It can scarcely be doubted, however, that where the statutory provision goes further than the common law, the former will receive effect.

259. The principle that a trustee cannot be *auctor in rem suam*, which is found in and has been adopted from the civil law, applies to all persons acting in any fiduciary capacity, and may be amplified as follows:—

(1.) Trustees cannot in any capacity purchase the trust property under their administration, of whatever kind or nature it may be, or acquire collateral rights, such as outstanding debts forming part of the trust-estate.¹

(2.) Trustees cannot contract with themselves as individuals to execute work for or supply goods to the trust-estate.² But it has been held that a contract entered into between a joint-stock company and the police commissioners of a burgh, subject to the General Police Act of 1850, was not null by reason of some of the commissioners being shareholders of the company, inasmuch as the commissioners did not transact with themselves

¹ York Buildings Company *v.* Mackenzie, *ut sup.*; Jeffrey *v.* Aitken, 16th June 1826, 4 S., 722; Mackellar *v.* Balmain, 8th March 1817, 19 F.C., 320; Taylor *v.* Watson, 20th January 1846, 8 D., 400; Gillies *v.* Maclachlan's Reps., 11th February 1846, 8 D., 487; Brown *v.* Burt, 23d December 1848, 11 D., 338; Thorburn *v.* Martin, 8th July 1853, 15 D., 845; Elias *v.* Black, 9th July 1856, 18 D., 1225; Faulds *v.* Corbet, 25th February 1859, 21 D., 587; University of Aberdeen *v.* The Magistrates of Aberdeen, 18th July 1876, 3 Rettie, 1087; *aff.* H.L., 23d March 1877, 4 Rettie (H.L.), 48; 2 App. Cas., 544.

² Aberdeen Railway Company *v.* Blaikie, *ut sup.*, and 23 L.T., 315. In this case the directors of a railway company contracted to supply the company with iron railway chairs. It was pleaded that sections 88 and 89 of the Companies Clauses Acts, 8 and 9 Vict., c. 17, did not avoid such contracts, but only incapacitated the director violating its provisions from continuing to act as a director; but the House of Lords, reversing the judgment of the Court of Session, held the contract void at common law, and not enforceable against the company.

as individuals, but with the company in its corporate capacity.¹

(3.) Trustees cannot retain for their own benefit any

¹ Paterson v. Portobello Town-Hall Company (Limited), 22d May 1866, 4 M.P., 726. In this case a contract entered into between the Portobello Town-Hall Company (Limited) and the Police Commissioners of Portobello was sought to be reduced, on the ground that some of the commissioners were shareholders of the company. The court held that the contract was not thereby rendered null. On advising, Lord Curriehill said, "The second plea is important. The ground on which it is maintained is the maxim that where functionaries of a public body are acting in their fiduciary character, they have no power to enter into contracts with themselves as individuals. In support of this contention, reference was made to the case of Blaikie v. Aberdeen Railway Company, in the House of Lords, in which that principle was affirmed. And if the case depended on that principle, I should be of opinion that the contract now under challenge would be null and void. But the answer made to this challenge is this, that the pursuers, the police commissioners, did not transact with themselves as individuals, but that the party with whom they entered into the contract was this joint-stock company in its corporate capacity; and the question comes to this, whether the principle of Blaikie's case is a sufficient ground for annulling all contracts, however fair or useful they may be, entered into between the functionaries of a public body and any joint-stock company in which any of them are office-bearers, or even partners, and without any inquiry into the merits of the transaction. After giving the case every consideration, I am of opinion that the answer made on behalf of the defenders is a good one. It would be most extraordinary if no public body could enter into a contract with any joint-stock company whatever, however useful or fair the transaction might be, if it happened that any of the functionaries of such public body happened to be also directors or partners of the joint-stock company. It is needless to enlarge on this. It is impossible that the business of the country could proceed if this were the law. The principle contended for does not apply, because the functionaries of the public body, in this case, were not dealing with themselves individually, but with a corporate body, which is a separate party in law. I think that Blaikie's case has no application, because there the party was dealing with himself as an individual." Lords Deas and Ardmillan concurred. The Lord President (M'Neil) said, "I have arrived at the same result. I think the distinction taken between Blaikie's case and this, in the argument for the defenders, is well founded, and it would be pushing the principle of that case farther than it will warrant, if we were to hold this case to fall under it. I think the defenders' contention receives material countenance from the act of parliament, for though the words are somewhat obscure, yet this much is very clear, that there is an exception made in reference to the case of contracts entered into by the commissioners with any chartered or joint-stock company, of which some of them may be partners. It may be that this provision has reference to standing for offices, but it also has reference to competition for contracts; and, therefore, I read the provision as making an exception of contracts so entered into. I do not say that it is an alteration of the law as laid down in Blaikie's case, but

claim or security for which the trust-estate is liable, which they may have acquired,¹ or any abatements or easements they may have received in settling the liabilities of the trust-estate,² or any advantage they may have gained through the execution of the trust.³

(4.) Trustees cannot lend the trust-money to themselves, or to any of their own number. If they do, any loss thence arising will fall upon themselves personally.

it is very strong confirmation of the view that *Blaikie's* case does not apply."

On this subject, the town council of St. Andrews, on 17th September 1872, obtained the following opinion from Lord Rutherford Clark, then Solicitor-General:—"I am of opinion that all contracts between the town council and a member of the town council are illegal. In the case of *Blaikie v. Aberdeen Railway Company* [*supra*], it was laid down that any contract between a body of trustees and one of their number was illegal. This doctrine was fully recognised in the more recent case of *Paterson v. Portobello Town-Hall Company* [*supra*], although the court did not extend it to contracts between two public bodies where certain persons were members of both.

"If such contracts were entered into, and the goods supplied or the work done, I do not think that the town council could retain all the benefit and pay nothing. But, in my opinion, it would be illegal for them to pay to the contractors more than their outlay, exclusive of all profit." See *Lord Gray, etc. v. Dundas & Wilson*, 12th Nov. 1856, 19 D., 1; 28 Jur., 522.

¹ *Maxwell v. Maxwell*, 15th November 1677, M., 16,166; *Rae v. Glass*, 21st February 1673, M., 16,170; *Ogilvie v. Lyon*, February 1729, M., 16,200; *Wright v. Wright*, 24th June 1712, M., 16,193; *Earl of Crawford v. Hepburn*, 6th March 1767, M., 16,208; *Hamilton v. Wright*, 8th March 1839, 1 D., 668; reversed 2d August 1842, 1 Bell's App., 574.

² *Earl of Northesk v. Carnegie*, 21st February 1702, 4 Br. Sup., 529; *Anderson v. Lauder*, 21st November 1740, Elchies, *voce* Trust, No. 10.

³ *University of Aberdeen v. The Magistrates of Aberdeen*, *ut sup.* In that case the Lord President (Inglis) said,—“The town of Aberdeen, acting through the Provost, Magistrates, and Council, were trustees for the parties entitled to benefit by these mortifications, and they were not as such trustees entitled to purchase the trust estate. Yet that is the very thing they did.” The Lord Chancellor (Cairns)—“It is one of the first principles founded upon no technical rule of law, but upon the highest principles of morality, that whenever a trustee, being ostensibly the owner of a property, acquires any benefit as owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficiaries under the trust.” *Huntington Copper Co. v. Henderson*, 12th January 1877, 4 Rettie, 294; aff. H.L., 29th November 1877, 5 Rettie 1. In that case Lord Young thus stated the doctrine of the law:—"Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent." And the Lord President (Inglis) expressly adopted Lord Young's statement.

Nor can they as trustees in one character lend money to themselves as trustees in another character,¹ unless expressly authorised by statute to do so.²

(5.) Trustees cannot legally grant or take leases in their own favour of any part of the trust-estate.³ If any part of the estate consists of leasehold property, and the trustee obtains a renewal of the lease in his own name, he will be regarded as holding it for behoof of the beneficiaries.⁴

(6.) Trustees must not retain and use for their own benefit rights or privileges, such as those of shooting or fishing, which belong to the estate, and can reasonably and with advantage to the estate be let or otherwise profitably applied.⁵

260. The office of a trustee is essentially gratuitous; and therefore a trustee is not entitled to charge by himself

¹ *Perston v. Perston's Trs.*, 9th Jan. 1863, 1 Macph., 245; *Baird v. The Magistrates of Dundee*, 18th November 1865, 4 Macph., 69. In Baird's case the magistrates and town council of Dundee had been in use to lend charitable trust-funds of which they were the trustees to themselves as a corporation, or as trustees of other institutions. On the ground that this was illegal, two burgesses applied for sequestration of these funds, and the appointment of a judicial factor. The Court sustained the title of the petitioners, and though subsequently, when the funds were deposited in bank, the Court, of consent of the petitioners, found it unnecessary to pronounce on the subject-matter of the petition, they found the magistrates and council liable in the expenses of the application.

² The Glasgow Municipal Act, 1878, expressly authorises this by section 24, which enacts as follows:—"The corporation as such, and as police commissioners, water commissioners, gas trustees, improvement trustees, markets commissioners, and parks and galleries trustees, or any one or more of them, may (but so as not in any case to borrow more than the sums of money they are respectively authorised to borrow) from time to time borrow from and lend to each other such sums of money, for such times, in such manner, and on such terms and conditions as they respectively mutually agree."

³ *Ex parte Hughes*, 8th June 1801, 6 Vesey (Chancery), 617; *Attorney-General v. Earl of Clarendon*, 17th August 1810, 17 Ves., 491, 500. See opinions of judges in *Perston v. Perston's Trustees*, 19th January 1863, 1 Macph., 249.

⁴ *Wilson v. Wilson*, 26th June 1789, M., 16,376; *Bee v. Wallace's Executors*, 19th June and 10th July 1745, M., 6008, 6011; *Parkhill v. Chalmers*, 7th Dec. 1771, M., 16,365; aff. 12th Feb. 1773, 2 Pat. App., 291.

⁵ *Menzies v. Menzies*, 10th March 1852, 14 D., 651; *M'Pherson v. M'Pherson*, 24th May 1839, 1 D., 795; aff. 13th August 1846, 5 Bell, 280; *Sinclair v. Lord Duffus*, 24th November 1842, 5 D., 174.

or his partner for professional services,¹ but he may recover costs out of pocket including interest on outlays.² On the same principle a trustee cannot accept a salary or remuneration for any office or appointment under the trust, such as that of factor, cashier, or chamberlain.³ To this rule, however, the law has established exceptions in cases in which the trustee is specially employed by the truster⁴ or by the beneficiary,⁵ or where the deeds or articles constituting the trust either specially or by implication authorise the trustee⁶ to take benefit in such ways.

¹ *Home v. Pringle*, 22d June 1841, 2 Robinson's App., 384; *Morrison v. Rennie*, 14th July 1847, 9 D., 1483; reversed 26th April 1849, 6 Bell, 422; *Flowerdew's Trustees, Petitioners*, 22d December 1854, 17 D., 263; *Lord Gray v. Dundas*, 21st June 1856, 19 D., 1; 28 Jur., 522; *Aitken v. Hunter*, 24th May 1871, 9 Macph., 759; *Mitchell v. Burness*, 20th July 1878, 5 R., 1124.

² *Bremner v. Mabon*, 13th Dec. 1837, 16 S., 213; *Napier v. Balfour*, 2d June 1835, 13 S., 853.

³ *Home v. Pringle*, 22d June 1841, 2 Robinson's App., 384; *Seton v. Dawson*, 18th December 1841, 4 D., 312; *Bon Accord Insurance Coy. v. Souter's Trustees*, 13th June 1850, 12 D., 1010; *Wellwood's Trustees v. Hall*, 17th December 1856, 19 D., 187; *Fegan v. Thomson*, 20th July 1855, 17 D., 1146.

⁴ See opinion of Lord Neaves in *Lord Gray v. Dundas & Wilson*, 12th November 1856, 19 D., 22; and opinion of Lord Cranworth in *Morrison v. Baillie*, 2 Macqueen's App., 86.

⁵ *Ommaney v. Smith*, 3d March 1854, 16 D., 721; *Dixon v. Rutherford*, 11th November 1863, 2 Macph., 61; *Scott v. Handyside's Trs.*, 24th January 1868, 6 M.P., 753.

⁶ *Findlay's Trustees v. M'Conie*, 6th March 1852, 14 D., 621; *Goodsir v. Carruthers*, 19th June 1858, 20 D., 1141.

On 17th September 1872 the town council of St. Andrews obtained the following opinion from Lord Rutherford Clark (then Solicitor-General):
 "In my opinion it is not illegal for the town council to appoint a member of their body to the office of city factor, or to any such office, or for a member of the town council to hold the office of city factor or any such office. But it is illegal for the town council to pay, or for the member of council holding such office to receive, from the city funds any salary or remuneration."

"The town council are, in my opinion, trustees for certain public purposes, and the law which obtains in regard to private trusts is applicable to public trusts. It depends on the existence of the trust, and therefore it is immaterial whether the trust be public or private."

"I think that a body of trustees have power to appoint one of their own number to be factor to the trust. See the opinion of Lord Deas in *Goodsir v. Carruthers* (19th June 1858), 20 D., 1149, and also the opinion of the Lord Chancellor in *Home v. Pringle* (22d June 1841), 2 Rob. Apps., 433. Hence, I think that the town council may appoint one of their own number to the office of city factor, or to any similar office. But it is quite settled that a trustee cannot receive emolument for any services

261. The Act 24 and 25 Vict., cap. 84 (1861), as explained by 26 and 27 Vict., cap. 115 (1863), enacts that all trusts constituted by virtue of any deed, or by private or local act of parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed—that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions. “The Trusts (Scotland) Act, 1867” (30 and 31 Vict., cap. 97), gives still further facilities for the administration of trust estates, and empowers trustees, *inter alia*, to appoint factors and law agents, and to pay them a suitable remuneration, to discharge trustees who have resigned, and the representatives of trustees who have died; to grant leases of the heritable estate for a period not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals; to uplift, discharge, or assign debts due to the trust estate; to compromise and refer claims connected with the estate; and to grant all deeds necessary for carrying into effect the trust powers, where such acts are not at variance with the terms or purposes of the trust. It empowers the Court of Session to authorise trustees to sell or grant feus or long leases, or excamb any part of the trust estate, or to borrow money on security of the estate, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the

rendered by him to the trust, and that, when one of the trustees has been appointed factor, he must discharge the duties gratuitously. Consequently, it is, in my opinion, illegal for the town council to pay from the city funds any salary or remuneration to one of their number who holds the office of city factor or any similar office.”

intention thereof. It also extends the powers of trustees as to the sale of the trust estate, and the investment of the trust funds, and provides for the resignation of trustees and the assumption of new trustees. The words "gratuitous trustees" in the sense of these three acts, are defined to mean and include all trustees who are not entitled as such to remuneration for their services in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust; but it is provided that no trustee to whom any legacy, or bequest, or annuity is expressly given on condition of the recipient thereof accepting the office of trustee under the trust, shall be entitled to resign the office of trustee by virtue of any of these acts, unless otherwise declared in the trust-deed.¹

262. It has been seen that by the law of Scotland, as interpreted by the Court of Session in a series of decisions, the funds of royal burghs are liable in damages for the failure of the magistrates, or their servants, to fulfil certain duties imposed on these burghs.² Similar liability it is *now* held attaches to the funds under the administration of statutory trustees, *e.g.*, road trustees, harbour trustees, and commissioners of police, for damages occasioned by negligence or improper conduct, or failure of duty on the part of these trustees, or their servants acting under their authority in the performance of their statutory duty. This principle was recognised by the Courts in Scotland previous to 1839, and was given effect to by the Court of Session in the case of *Findlater v. Duncan*.³ But the House of Lords

¹ As explanatory of the powers conferred by these acts, see the case of *Maxwell's Trustees v. Maxwell*, 4th November 1874, 2 R., 71.

² See No. 213 of these Observations.

³ 18th July 1837, 15 S., 1304; 19th June 1838, 16 S., 1150; 10 Jur., 507. In this case the Court of Session held that road trustees on a public road were liable as trustees for injury sustained by passengers

reversed the judgment in that case, declared the Scottish doctrine and practice to be erroneous, and decided that no such liability could attach to trust funds appropriated by statute to specified purposes.¹ The same doctrine was applied by the House of Lords in the case of *Thomson v. Mitchell*;² and subsequently in that of *Ross v. Heriot's Hospital*.³ The courts in Scotland conformed their practice to the rule thus laid down by the House of Lords, but refused to extend it beyond the precise class of cases to which they considered it to be applicable; and continued to hold the magistrates and councils of royal burghs liable for injuries sustained through their failure to keep the thoroughfares of the burgh in a safe state, because they had, in the common good, a fund which could be made available to repair the damages caused by their

in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or the officers of the trustees, when engaged in any operation performed under the authority of the trustees.

¹ 23d August 1839, M'L. & Rob., 911; 12 Jur., 135. The Lord Chancellor (Cottenham) thus expounded the law: "But why should the trust funds be so liable? If the thing done be within the powers of the statute, the party sustaining any damage from it cannot be entitled to compensation unless the statute itself provides it, and for this reason, that upon this supposition the act creating the damage would be lawful. If, then, the thing done be not within the powers of the statute, either from exceeding these powers or from the manner of doing it, why should the public funds bear the burden of indemnifying the guilty party? Many cases may be supposed in which the trustees may be so far actors in the transaction creating the damage as to render their property liable, but none in which the trust funds ought to be applied in satisfaction of the party injured."

² 28th July 1840, 1 Rob. App., 162; 13 Jur., 386: reversing the decision of the Court of Session, 1st February 1838, 16 S., 409.

³ 14th February 1843, 5 D., 589; 15 Jur., 298; H.L., 19th March 1846, 5 Bell's App., 377; 18 Jur., 386. In this case damages were claimed out of the Heriot estate in respect the governors had erroneously deprived Ross of the benefits of the charity. The Court of Session sustained the action, to the effect of remitting to the Lord Ordinary to hear parties as to the conclusions for damages, holding that the rule established in *Findlater v. Duncan* was not applicable. But the House of Lords held it to be applicable, reversed the decision, and refused to listen to the statement of the wrong,—the pursuer having asked redress out of the trust funds, which they held not to be liable to any such demand. Referring to the rule laid down in *Findlater v. Duncan*, Lord Brougham said, "It was perfectly clear, upon all principle and analogy, and upon every view of common sense that could be taken of the matter, that it

failure of duty.¹ In 1865 the House of Lords were called on to decide the question whether statutory trustees, both in Scotland and England, were bound to pay local rates out of specially appropriated funds in their hands,² and they held that they were bound to do so.

In the following year the liability of statutory trustees, in their corporate capacity, and of the funds under their management, for damages occasioned by the neglect of servants, was again brought under the consideration of the House of Lords, in the cases of the *Mersey Docks Trustees v. Gibbs and Others*, and *Idem v. Penhallow*,³ and after taking the opinion of the English judges, the House solemnly affirmed the liability. In arriving at this decision, the judges who advised the House of Lords condemned the principle recognised in *Findlater v. Duncan*. Lord Wensleydale

was rightly laid down ;” and Lord Campbell said, with reference to the doctrine given effect to in Scotland previous to *Findlater’s* case, “that doctrine is contrary to all reason and sense and justice ; it is wholly unsupported by any authority, and I think we may safely say it is entirely contrary to the law of Scotland.”

¹ *Dargie v. The Magistrates of Forfar*, 10th March 1855, 17 D., 730 ; 29th January 1856, 18 D., 343 ; *Kerr v. The Magistrates of Stirling*, 18th December 1858, 21 D., 169.

² *Clyde Navigation Trustees v. Adamson*, 27th January 1860, 22 D., 606 ; 32 Jur., 203 ; 26th June 1863, 1 Macph., 974 ; 35 Jur., 569 ; aff. 22d June 1865, 3 Macph. (H.L.), 100 ; 37 Jur., 512 ; 4 Macq. App., 931. *Mersey Docks Commissioners v. Cameron*, 22d June 1865, 35 L.J. (M.C.) 1 ; 11 H.L.C., 443 ; and *Mersey Docks Commissioners v. Jones*, 22d June 1865, 35 L.J. (M.C.), 1 ; 11 H.L.C., 443. In the first of these cases the Court of Session was in favour of the liability ; in the second, the Court of Exchequer Chamber in England was also in favour of liability ; but in the third case, the latter court was against liability. The House of Lords affirmed the judgment of the Court of Session in the case of the *Clyde Navigation Trustees v. Adamson*, and of the Exchequer Chamber in the case of the *Mersey Docks Commissioners v. Cameron* ; but reversed the judgment of the Exchequer Chamber in the case of the *Mersey Docks Commissioners v. Jones*.

³ 5th June 1866, 35 L.J. Ex., 225 ; L.R. 1 E. & I., Ap., 93. In the former of these cases the judgment of the Court of Exchequer was against the liability [1 H. & N., 439] ; but this was reversed by the Court of Exchequer Chamber [3 H. & N., 164]. The latter case came before the Exchequer Chamber by bill of exceptions, and judgment went to the same effect [7 H. & N., 329]. In both cases the judgments of the Exchequer Chamber were affirmed by the House of Lords.

referred to the judgment of the House in the cases of the *Mersey Docks Commissioners v. Cameron* and *v. Jones* as deliberately and firmly establishing a principle applicable as clearly to the liability of statutory commissioners or trustees, for the negligence of themselves or their servants, as to the liability of their property to rates. And Lord Westbury said, "These observations of Lord Cottenham, which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done—would, if they were recognised as the law, undoubtedly lead to very great evil and injury."¹ In 1873, the liability of statutory trustees administering funds appropriated by statute to special purposes to give compensation from the trust funds for damages caused by the fault of their servants was directly affirmed in Scotland in *Virtue v. the Police Commissioners of Alloa*.²

263. Subject to the exceptions above mentioned—if, indeed, cases such as the *Mersey Docks v. Gibbs* and *Penhallow*, and *Virtue v. the Police Commissioners of Police of Alloa* can be regarded as exceptions—the general rule of law is, that trustees, whether public or private, are bound to apply the funds under their administration

¹ L.R. 1 E. & I. App., 127.

² 12th December 1873, 1 Rettie, 285. In that case the Police Commissioners of Alloa, acting under the General Police Act of 1862, were held liable for damages caused by the negligence of a person in their employment while engaged in the execution of his duty. In his judgment, the Lord President (Inglis) reviewed the decisions bearing upon the question, and after alluding to the "great inconvenience and even injustice that must inevitably arise from this sudden and complete alteration of the rule of law applicable to such cases," said, "but all that we can do I think we are bound to do, and that is, by our judgment in this case to make it known to the lieges that such claims and rights of action are no longer excluded by the judgment of the House of Lords in *Duncan v. Findlater*."

See also *Stephen v. Thurso Police Commissioners*, 3d March 1876, 13 Scot. Law Rep., 339 ; 3 Rettie, 535.

strictly in accordance with the provisions of the charter, deed, or statute by which the trust is constituted, or its purposes defined, and for no other purpose. If, therefore, they exceed their powers, or fail to perform their duty, the trust-estate will not be liable for the consequent loss, but they may be held personally liable. The rule is illustrated by a number of decisions. Thus, in the case of *Pearson v. the Town of Montrose*,¹ it was held that the magistrates were not countable to the town for a taxation imposed by parliament, not upon the town's common good, but upon the inhabitants severally, nor were the inhabitants liable for the magistrates, who had not the power of collection by their office but by the commission of parliament. The then magistrates were accordingly held not liable for the delict of their predecessors, but the right of the pursuer to insist against the former magistrates, their heirs and executors, was reserved. In *Ross v. the Governors of Heriot's Hospital*,² it was held that claims for damages in respect of acts of the governors, in the face of the will and statutes of the hospital, made not against the trustees by whom the illegal and improper acts were done, but against the funds, could not be sustained. In *the Ministers of Edinburgh v. the Magistrates*,³ the same principle was applied to the failure of the magistrates, as statutory commissioners, to appoint stent masters in terms of the statute.

263. Trustees, whether public or private, are, however, entitled to charge against the trust-funds expenses of administration, including expenses of factors and agents and consulting counsel,⁴ expenses of litigations

¹ 23d June 1669, M., 13,098, referred to by Lord Campbell in the case of *The Ministers of Edinburgh v. The Magistrates*, 28th May 1845, 7 D., 663; 17 Jur., 367; H. of L., 27th July 1849, 6 Bell's App., 509; 21 Jur., 632.

² 14th February 1843, 5 D., 589; 15 Jur., 298; H. of L., 19th March 1846, 5 Bell's App., 377; 18 Jur., 386.

³ *Supra*.

⁴ *Shepherd & Grant*, compeers in *Gillies v. Hutton's Trustees*, 24th February 1854, 17 D., 516.

beneficial to the trust-estate, either in the way of obtaining necessary direction, or of protecting the estate, and also expenses of litigations undertaken *bona fide*, and on reasonable grounds, for the defence of the trust property and their rights as trustees, though such litigations may eventually be unsuccessful.¹

(1.) They are also entitled under the general law applicable to trustees, and though the charter, deed or statute under which they may be acting confers no express power to them to apply the trust funds to such a purpose, to charge against the trust estate the expense of opposing any bill which may be promoted in parliament by private persons attacking the existence of the trust or its property, or, it would seem, the rights, powers, or privileges of the trustees.²

¹ *Ibid.* ; Hill v. Burns, 14th April 1826, 2 W. and S., 80.

In the King v. The Corporation of Tamworth, 24th November 1868, 19 L. T. (N.S.), 433, it was held that costs of litigation, undertaken *bona fide*, and on reasonable grounds, for the defence of corporate rights, may be paid out of the borough fund, though such litigation is eventually unsuccessful.

Attorney-General v. The Mayor of Norwich, May 1837, 2 Mylne and Craig (Chancery), 406.

See dicta of Vice-Chancellor Page Wood (afterwards Lord Chancellor Hatherley), and of Lord Justice Turner, in the Attorney-General v. Wigan, 24th and 25th January 1851 ; 1 Kay (Chancery), 268 ; 5 De Gex, Macnaghten and Gordon (Chancery), 55.

The Queen v. The Mayor of Sheffield, 1st and 10th June 1871, L.R., 6 Q.B., 652. In this case Mr. Justice Blackburn said,—“ We have already decided, more than once, that when there is property belonging to the corporation—estates of their own—and anybody attempts to take away those estates, though there is no express enactment, yet the very fact that the corporation are owners of the property which is put into the borough fund would make any litigation concerning it a purpose for carrying out the objects of the act within the general terms. Whether or not we have any power in the Court of Queen's Bench, if litigation is commenced and expenses are incurred for such a proper purpose, to inquire whether that litigation was excessive, or those expenses were excessive, is a point on which I have not made up my mind. But that the Court of Chancery has power to look into it and say whether it is reasonable or not, seems to be well established.”

See *dictum* of the Master of the Rolls (Jessel) in Attorney-General v. The Mayor of Brecon, 14th and 16th December 1878, L.R., 10 (Chancery), 204.

² Petitioner Campbell, 12th January 1847, 9 D., 397. In this case, trustees of an entailed estate, under a private act of parliament, who had opposed a bill in parliament by which it was proposed to form a railway

Thus, as regards English municipal corporations, the borough fund, constituted by section 92 of the Municipal Corporation Act, 1835, is appointed to be applied to certain specified purposes, and to such expenses not otherwise provided for by the act "as shall be necessarily incurred in carrying into effect the provisions thereof;" and where the borough fund is more than sufficient for these purposes, the surplus is appointed to be applied, "under the direction of the council, for the public benefit of the inhabitants and improvement of the borough;" but where the borough fund is not sufficient for these purposes, the council is authorised to levy a borough rate to such an amount as, in addition to the borough fund, may be necessary to pay the expense to be incurred in carrying into effect the provisions of the act. Notwithstanding these special directions as to the purposes for which the borough fund is applicable, it has been held¹ that municipal cor-

through the estate, in such a way as to deteriorate its value, were held entitled to charge the expense against the estate.

Bright v. North, 13th February 1847, 2 Phillips (Chancery), 216; 16 L.J. (Chancery), 255. In this case, the trustees for the conservation of the river Ouse were found entitled to the expense of opposing a bill for a project likely to prove injurious to the banks under their superintendence. Lord Cottenham said that the trustees were entitled to the proper and necessary expense of protecting the property committed to their care; and although there was no direct authority in their act of parliament for the application of the funds to the proposed purpose, he thought it was incident to the powers given to the commissioners and the duties imposed on them.

The same principle was affirmed by the Court of Queen's Bench in *The Queen v. The Norfolk Commissioners of Sewers*, 5th June 1850, 15 Q.B., 540; 20 L.J., Q.B., 121. *Bower v. The Commissioners of Sligo, etc.*, 24th and 25th Nov. 1869; Irish Reports, 4 Com. Law, 489, and *The Queen v. The Mayor, etc., of Dublin*, 3d June 1862, 9 L.T. (N.S.), 123.

¹ *The Queen v. The Town Council of Lichfield*, 6th May 1847, 10 Q.B., 534; 16 L.J. (Q.B.), 333. *Holdsworth v. The Mayor, etc., of Dartmouth*, 24th January 1840, 11 Adolphus and Ellis, Q.B., 490; 4 Jur., 605. *The Queen v. Town Council of Lichfield*, 10th June 1843, 4 Q.B., 893; 12 L.J. (Q.B.), 308. *The Queen v. Prest*, 16th November 1850; 16 Q.B., 33; 20 L.J. (Q.B.), 17. *Lewis v. The Mayor, etc., of Rochester*, 13th November 1860, 9 Common Bench (N.S.), 401; 30 L.J. (C.P.), 169.

But in the following cases they were found not entitled to charge the borough funds with the costs of legal proceedings which did not involve a question of the corporate rights and privileges:—*The Queen v. The Mayor of Leeds*, 31st May 1843, 4 Adolphus and Ellis, Q.B., 796.

porations in England are entitled to defray out of the borough funds or rates the costs incurred by them in defending their existence, property and rights, powers and privileges.

The Queen v. Bridgewater, 29th January 1839; and The Queen v. Paramore, 3d June 1840, 10 Adolphus and Ellis, Q.B., 281-286. The Queen v. Town Council of Stamford, 30th January 1844, 4 Q.B., 900, N.; 13 L.J. (Q.B.), 177. The Queen v. Thompson, 20th January 1844; 5 Q.B., 477; Davison and Merivale, K.B., 497. The Queen v. The Mayor, etc., of Liverpool, 30th January 1872, 41 L.J. (Q.B.), 175. The Queen v. Dunn, 8th May 1844, 5 Q.B., 959. The Queen v. The Mayor of Tamworth, *ut supra*. The Queen v. The Mayor of Sheffield, 1st and 10th June 1871, L.R., 6 Q.B., 652.

Mr. Brice in his "Treatise on the Doctrine of *Ultra Vires*" (2d edit.), thus states the result of the several cases, illustrating this branch of the law in regard to English municipal corporations:—"first, that it is only the invasion, actual or contemplated, of either the franchises, the rights or the property of a corporation, which will justify an expenditure of the corporate funds, not an action, a *quo warranto* information, or the like brought against individual members of even the governing body; secondly, that, save under very exceptional circumstances, a corporation may not indemnify a member for expenses incurred by him in maintaining his rights as a member; but, thirdly, that the courts construe the corporate 'rights' somewhat liberally, and therefore, if legal proceedings be necessary to protect the mayor or other members of the governing body in the discharge of his functions, or to secure the corporation against the doing of acts which may, though remotely, prejudicially affect its interests, the costs of such proceedings may be defrayed out of the corporate assets; provided, however, fourthly, that there be no prohibition, express or implied, against undertaking the proceedings in question; for if so, no measures, no damage, no benefit, present or prospective, will justify the same."

The Attorney-General v. Wigan, 24th and 25th January, 1851, 1 K. (Chancery), 268; 5 De Gex, Macnaghten and Gordon (Chancery), 52. In this case it was proposed to apply the borough fund towards payment of the expense of opposing in parliament a bill for the construction of waterworks, and for the doing of acts which, if done, would interfere with the course of a river flowing through the borough, so as to prevent the efficient action of the stream in removing the sewage of the town, and thus indirectly to affect the value of rateable houses in the borough, the tolls of the market, and the other property forming the borough fund. An injunction to prevent such an application of the borough fund was refused by Vice-Chancellor Page Wood, afterwards Lord Chancellor Hatherley, on the ground that, inasmuch as the expenditure had been incurred for the prevention of what would have led to the creation of a nuisance, and as the corporation had within its powers of local government the duty of preventing nuisances that might be said to be within the scope of its powers, and therefore a thing done in furtherance of the government of the borough and the execution of the powers of the act. The decision was affirmed by the Lords-Justices on appeal, but seems to have been ruled, both by Lords Justices Knight, Bruce, and Turner, on the ground that the expenditure was incurred

But nothing short of such defence will, it would appear,¹ warrant an application of funds, by a purely statutory body existing for the discharge of statutory duties, towards the cost of a parliamentary opposition.

bona fide for the protection of corporate property. It was afterwards commented on with disapproval in *The Queen v. The Mayor of Sheffield*, *infra*.

The Attorney-General v. The Mayor of Brecon, 14th and 16th December 1878, L.R., 10 Chancery, 204. In this case, Sir George Jessel, Master of the Rolls, held that municipal corporations having been reduced by the Municipal Corporations Act, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate. Consequently he decided, after an instructive review of the cases of *Bright v. North*, *Attorney-General v. Corporation of Wigan*, and *The Queen v. The Mayor of Sheffield*, that a municipal corporation has the right, either under section 92 of the Municipal Corporations Act, 1835, or under the general law applicable to trustees, to defray out of the borough funds or rates, the expenses of any attack made by bill in parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges. "Whether," he said, "we consider that under the words, 'expenses necessarily incurred,' or similar words, used in the act, this incidental expenditure is included; or whether we consider that the general law as to the rights of trustees defending their property and privileges remains unaffected—in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before parliament."

¹ *Brown v. Adam*, 19th February 1848, 10 D., 744. In this case, the directors of the Edinburgh and Perth Railway were interdicted from applying the funds of the shareholders towards payment of the expense of applying to parliament for an extension of their powers.

Myles v. M'Ewen, 13th December 1850, 18 D., 205. In this case, the Police Commissioners of Dundee, acting under a local act which was about to expire, applied to parliament for a new bill, but were opposed. Meanwhile, the General Police Act of 1850 was passed, and was adopted by the householders. The bill was accordingly abandoned after about £1000 of expenses had been incurred. The court held that though the commissioners had promoted the bill *in optima fide*, the expenses could not be charged against the funds of the old police commissioners.

The Queen v. The Mayor of Sheffield, 1st and 10th June 1871, L.R., 6 Q.B., 652. A waterworks company incorporated by act of parliament, supplied the greater part of Sheffield with water. By this act, the company were bound, after a certain time, on the requisition of the town council to give a constant supply of water; and they were empowered to make regulations to be observed by the consumers, subject to the approval of two justices—any person aggrieved having the right to oppose the regulations before the justices. The town council having required the company to give a constant supply, the company proposed certain regulations, which were opposed before the justices by the corporation on the ground that they imposed too onerous conditions on the consumers; and the justices modified the regulations accordingly. The

(2.) Trustees, whether public or private, administering property or funds, the application of which is regulated by charter, deed, or statute, are not entitled, without ex-

company also promoted a bill in parliament to obtain further time for the constant supply, which the corporation opposed; and it was ultimately withdrawn. The town council made two orders for the payment out of the borough fund for the expenses of the opposition before the justices and in parliament respectively, which were paid, notwithstanding objection that the orders were *ultra vires*. There was no surplus from the property of the corporation, and borough rates were made. On a rule for *a certiorari*, under 7 Will. IV. and 1 Vict. c. 78, sec. 44, to bring up these orders for the purpose of quashing them, it was held that, assuming the objects for which the expenses were incurred to be for the public benefit of the inhabitants of the borough, yet they were not within the terms of section 92 of the Municipal Corporation Act, 1835, as "expenses necessarily incurred in carrying into effect the provisions of the act," and they could not come within the clause which enabled the town council to apply the funds "for the public benefit of the inhabitants of the borough," as there was no surplus. The ground of the Lord Chief-Justice's decision was, that the opposition in Parliament was beyond the scope of the municipal government of the borough, and Mr. Justice Blackburn, while he recognised the right of municipal corporations, under the provisions of the 92d section, to protect their property and to charge the borough fund and rate with the costs, observed that "there is no pretence for saying that what the council were doing here was in the least degree intended to protect their property."

Wakefield v. The Commissioners of Supply of Renfrew, 29th November 1878, 6 R., 259, and Scottish Law Reporter, vol. xvi., p. 183. The Commissioners of Supply of Renfrewshire opposed in parliament certain bills for the abolition of tolls, which had been introduced by the Government in 1876 and 1877. The grounds of opposition were—(1) That the bills if passed would impose new and important duties on the commissioners; and (2), That the proposed assessment would fall with undue severity upon Renfrewshire, owing to its proximity to Glasgow, the inhabitants of which made use of the roads to a large extent. The complainer, who was a commissioner, applied for interdict against any part of the county general assessment funds being applied in paying the expense of these oppositions. It was held that the commissioners were not entitled to pay these expenses out of the funds in their hands. The Lord President (Inglis) expressed his opinion that commissioners of supply of a county have no right or title to represent the owners of heritable property in the county unless in respect of what they are entitled to do by statute. They were in their origin a merely statutory body, and are now by statute a corporate body. They are all of them landowners in the county, but they are not all the landowners. The two bodies are not identical. If entitled to speak at all, it must be merely as a representative body, and that was never imposed on them as a duty by statute. The question is rather, was their opposition within their ordinary functions as commissioners of supply? and are the funds, under the 1868 act, applicable for the purpose for which they were used? . . . It is here that the commissioners fail entirely in their case. They have no

press or implied power to that effect, to go to parliament at the expense of the trust estate for an alteration or extension of their powers.¹

right as commissioners to spend any money on this opposition as falling within their duties under the head of county affairs. At first sight the argument is plausible. The commissioners of supply, it is said, are interested in the opposition of these bills, because it is proposed to lay new duties upon them. But I do not think that a statutory corporation is entitled to use the funds committed by statute to their hands for the opposition of a bill. As a corporation they had no interest. They might not like the duties proposed; but then they were at liberty to use their personal influence and their private funds in supporting their opposition. Setting this aside, we must always come back to the main inquiry, Was the opposition to the bill a matter with which, as a statutory body, the commissioners had anything to do? Corporate funds, statutory funds, or trust funds, can only be applied to the purposes to which they are destined by the statute, or trust deed, or the charter of incorporation, and not a shilling may be laid out in any other way. This is the general principle which is at the foundation of all our law on this subject. Let me not be misunderstood as questioning the right of any individual to petition parliament. This is a right at common law, and no court would seek to interfere with it. Nor does the exercise of the right necessarily involve any considerable expenditure. But it is not the petitioning of parliament which is here objected to, but the systematic opposition of a bill, and that bill one of a public character. To this purpose no statutory funds can be applied unless it is included in the purposes to which they are by statute destined."

The *Water-Works Commissioners of Perth v. M'Donald and Others*, 8th January 1879. In this case Lord Craighill, founding on the case of *Wakefield*, held that the commissioners under the local act of 1829 were not entitled to charge against the assessments levied by them under that act the expense of opposing the bill of 1877, by which it was proposed to supersede the act of 1829, and appoint new commissioners—such opposition not being within the purposes for which the act of 1829 was passed, and not being incidental to any of these purposes. The judgment was affirmed by the Judges of the Second Division on 17th June 1879.

¹ *Attorney-General v. Mayor, etc., of Norwich*, 4th May 1848, 16 Simon (Chancery), 225; affirmed on appeal, 21 L.J. (Ch.), 139. In this case the defendants were restrained from paying out of the borough fund the expense of promoting a bill in parliament to enable them to improve the navigation of the river flowing through Norwich. The Vice-Chancellor (Shadwell) held that the acts regulating the corporation did not authorise them to apply funds in obtaining powers which were not then vested in them, and could not be vested in them except by an act of parliament specially passed for the purpose.

The *Attorney-General v. The Guardians of the Poor of Southampton*, 23d May 1849, 17 Simon (Chancery), 6; 18 L.J. (Chancery), 393. Here the guardians of the poor of Southampton applied for an act of parliament to vary the mode of assessment, and to authorise the rates on small rents under £12 to be levied from owners instead of occupiers. The bill was lost, and the Court held that the guardians could not charge the cost thereof against the poor-rates under their administration.

(3.) When the magistrates and councils of royal and parliamentary burghs, or burghs of regality or barony, in Scotland, or other bodies, hold property or funds for

The Attorney-General *v.* Andrews, 24th January 1850, 2 Macnaghten and Gordon (Chancery), 225; 20 L.J. (Chancery), 467, on appeal before Lords Commissioners Langdale and Rolfe, affirming the decision of V. C. Shadwell, 19 L.J. (Chancery), 197. By a local act, the commissioners thereby appointed were authorised to construct reservoirs and other works for supplying the town of Southampton with water, and to do all things necessary for that purpose, to levy rates, &c., for these purposes, and otherwise for carrying the act into execution. The supply of water being insufficient, the commissioners applied for a new act for extending their works. Twenty of the commissioners were in favour of promoting the act, and only two opposed it. The Court held that, although the new act might be very desirable, the costs of promoting it could not be defrayed out of existing rates.

Attorney-General *v.* Eastlake, 29th April 1853, 11 Hare (Ch.), 205. In this case commissioners empowered to levy rates for paving, lighting, cleansing, watching, and improving the streets of a town, under the provisions of a local act, the powers conferred by which had been diminished by the Municipal Corporation Act, promoted a bill in parliament to have these powers increased. The defendants were restrained from applying their funds in paying the costs of the bill. In this case the Vice-Chancellor (Page Wood), afterwards Lord Chancellor Hatherley, advised persons promoting acts of this description to insert among the powers given by it, words to the following effect, "including, if necessary, the power of applying to parliament." It may be stated, however, that when such power has been sought, it has been refused, on the ground that parliament will not sanction by anticipation the payment out of trust funds of the costs of private bills.

Attorney-General *v.* West Hartlepool Improvement Commissioners, 21st April 1870, L.R., 10 Equity, 152. By a local improvement act passed in 1854, commissioners were incorporated, and a district was defined, and the commissioners were empowered to cause to be paved, drained, and otherwise improved, the town and township comprised in the district, and to be the surveyors of highways within the same, and to keep the same in repair; to "do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants" of the district, which they might deem or consider necessary, and "for that purpose" to "exercise all the powers vested in them" by the act, and the acts incorporated therewith, among which were the Companies Clauses Act, and parts of the Towns Improvement Clauses Act, 1847. The Court granted an injunction to restrain the commissioners from applying any moneys produced by rates towards the promotion of a bill in parliament, the object of which was to obtain an extension of their district.

Cowan and Mackenzie *v.* Law, 8th March 1872, 10 Macph., 578; Scot. Law Reporter, p. 341. In this case the trustees, acting under the Edinburgh and District Waterworks Act, applied to parliament for powers to bring in an additional supply of water. The bill was opposed by a number of ratepayers, but passed the House of Commons. It was rejected by the House of Lords. The trustees proposed to pay the expenses connected with

general or public purposes, the court will undoubtedly restrain them from exceeding or misusing their powers; but in the exercise of their powers it can scarcely be

the promotion of the bill. Interdict having been applied for, the trustees pleaded that they were under obligation to provide a constant supply of water to all the inhabitants under penalties which would have to be borne by the trust-funds, and that by the act of 1869 parliament had suspended the operation of the penalty clauses for five years, to enable additional supplies to be got, without which the trustees could not fulfil their statutory obligations. The bill was therefore intended to protect the trust-estate. The court, however, held (Lord Deas dissenting) that the obligation to give constant supply did not impose an obligation on the trustees to provide additional supplies of water if the existing sources were insufficient; that the statutes under which the trustees acted did not, either expressly or by implication, warrant the trustees to apply to parliament for the additional powers sought, and granted interdict against paying the costs out of the trust-funds. The judgment was appealed to the House of Lords, but the question was settled under an arrangement, sanctioned by parliament, before the appeal was heard.

The following excerpt from the note by Lord Gifford (Ordinary) to his interlocutor, is instructive as a statement of the general principles which apply to such cases, and as a review of the leading decisions of the English and Scotch courts illustrative of it:—"In the debate before the Lord Ordinary there was not much conflict between the parties as to the general principle or the general rule of law applicable to cases like the present; the great contest and the great difficulty arises in the application of an admitted principle to the peculiar circumstances of the present case—to the position of the respondents as trustees, and to the duties incumbent on them as such.

"In general, it may be said that trust-funds can only be applied to trust purposes, that in every case the powers of trustees are limited by the constitution of the trust, and that they cannot divert the trust-funds, or any part thereof, to purposes either opposed to or different from the purposes for which the trust was created. Of this principle there are multitudes of illustrations applicable to every different kind of trust; but it is always in each case a question, what is the real purpose of the trust, and what are the powers incidental thereto, which are either expressly or by implication vested in the trustees; and to determine this question, the nature, constitution, and circumstances of each particular trust must be looked to, and as these vary in each case, the general principle will vary in its application.

"In all cases, besides the powers expressly conferred upon trustees, there are many powers which are held as implied, and which, from their nature and variety, must almost necessarily be left to implication, and the real difficulty often is to draw the line, and determine the limit of these implied powers; and when the power claimed and exercised by trustees is peculiar or abnormal in its character, the difficulty is greatly enhanced, and very careful consideration may be required to determine whether it is or is not fairly within the trust.

"Now, the promoting or opposing a bill in parliament may be said to be in some respects an extraordinary act on the part of trustees. Not that it is an uncommon or unusual thing for trustees to do, for trustees

doubted a wider discretion will be allowed than is accorded to commissioners of police under local and general acts, or other statutory trustees, who, like municipal

of various descriptions both promote and oppose bills in parliament every day ; but the procuring of new legislation, or of powers which the legislature alone can give, is not, in general, an object for which a trust is constituted ; and unless there be express power to go to parliament it will require in general a pretty strong implication to justify trustees in doing so at the expense of the trust.

“ When the object of the bill promoted by the trustees is to obtain an increase or alteration of their own powers, or to change or subvert their own constitution, a strong case must be made out before the expense of such an unsuccessful attempt can be made against the proper trust funds. For it can never be presumed that trustees are appointed for the very purpose of altering, amending, or, it may be, entirely subverting their own powers and constitution. This point will be afterwards noticed when considering the special nature of the respondents’ trust.

“ It may be useful, before adverting to the specialties of the present case, to consider a few of the leading cases which have been decided relative to the powers of the trustees to promote or oppose parliamentary measures. These cases are referred to merely as illustrations of the general principle above stated, and which the Lord Ordinary thinks must regulate the present question.”

His lordship then referred to the cases of *Attorney-General v. The Guardians of the Poor of Southampton*, and *Attorney-General v. Andrews*, both above mentioned.

“ *Attorney-General v. Liverpool* [Nov. and Dec. 1835, and Jan. and Nov. 1837], 1 Mylne and Craig, 171 ; 7 L. J. (Chancery), 51.

“ *Attorney-General v. Norwich*, 4th May 1848 (16 Simon, 225).

“ *Stevens v. South Devon Railway Company* [16th and 17th Jan. and 8th Feb. 1851], 20 L.J. (Chancery), 491.

“ In *Taylor v. Chichester Railway Company*, 24th June 1867 (L. R., 2 Exchequer, 356), a railway company, in order to buy off opposition to an extension act, agreed to pay a landowner £2000. The act passed, but made no provision for the payment. Held by Exchequer Chamber that the £2000 could not be paid from the funds of the company.” [The decision of the Exchequer Chamber in this case was reversed by the House of Lords, on 1st July 1870 ; L.R. 4 E. & I., App., 628 ; 39 L.J. (Exch.), 217 ; 15 W.R., 147 ; see also 4 Hopwood and Coltman (Reg. App.), 409].

His lordship then referred to the cases of *Myles v. M'Ewan*, *Brown v. Adam*, and *Bright v. North*, all of which have been already noticed, and to *M'Lean [Macintosh's Trustees] v. Macintosh*, 30th June 1852, 14 D. 928, [referred to in footnote p. 453], and proceeded as follows :—

“ The same principle was recognised in *Campbell*, petitioner, 12th January 1847, 9 D., 397 ; *Mill v. Fraser*, 25th November 1859, 22 D., 33 ; *Regina v. Norfolk Commissioners of Sewers* [5th June 1850], 20 L.J., (Q.B.), 121 ; *Vance v. East Lancashire Railway*, 8th December 1856, 3 Kay and Johnson (Ch.), 50.

“ There are various other cases, most of which will be found referred to in the judgments above quoted.

“ The principle fairly to be gathered from these cases appears to be that

corporations subject to the English municipal corporation acts, have their duties and powers as regards the application of their property and funds strictly defined.¹

264. While the courts will restrain corporations and trustees from applying their funds in paying the expenses of promoting or opposing bills in parliament, when such an application of funds is not expressly or by implication authorised by the charter, deed, or statute under which the corporation or trustees act; and while it

in each it must be shown that the parliamentary costs were incurred in the exercise of powers either expressly or by clear implication conferred upon the trustees. It seems, further, that the expense of opposing a bill will be more easily admitted upon the trust-funds than the expense of promoting a bill—at least where the opposition to the bill is for the purpose of protecting the trust-estate.

“Applying these principles to the present case, the Lord Ordinary thinks, on a consideration of the whole statutes held by the respondents, that the respondents’ trust was not constituted or created for the purposes of obtaining new or additional supplies of water—that is, new sources of supply—but solely for the purpose of administering the existing supply—that is, the supplies and sources of supply, which by the statutes are now vested in the respondents. He has, consequently, felt himself compelled to disallow as a charge against the trust—that is, against the assessments which the respondents levy—the costs of the unsuccessful measure which the respondents promoted in last session of parliament.”

The grounds on which Lord Deas dissented from the judgment were that “what the trustees did was done in accordance with the real purpose, or one of the real purposes, of their trust, and with the powers conferred on them by implication, although not expressly set forth or specified.”

But see *The Queen v. The Mayor, etc., of Liverpool*, 5th May 1873, 21 Weekly Reporter, 674; 28 L.T. (N.S.), 500. In this case the defendants, having arranged to purchase the tramways of a tramway company, and as one of the terms of purchase to pay the expenses of a bill promoted by the company, was allowed, on the passing of the bill, to pay such expenses out of the borough funds.

¹ In deciding the case of *Cowan and Mackenzie v. Law*, *supra*, Lord Gifford was accordingly careful to explain that his judgment rested “on a special consideration of the respondent’s statutes;” and he added, “The grounds of the Lord Ordinary’s judgment would not in the least apply to bills promoted by town councils, or by other bodies who hold funds dedicated to general or public purposes.” The same distinction seems to be alluded to by Lord Cockburn in the note to his interlocutor in the case of *Ewing v. The Glasgow Commissioners of Police*, 19th January 1837, 15 S., 389; 12 F., 331, where he said, “The commissioners had *no property* in the police funds, or privileges so as to be entitled, like many other public trustees, to take all measures calculated to maintain or to extend their *interests*.”

has been asserted by eminent judges in England that the courts have power, by injunction, to prevent applications to parliament in relation to private property and rights, and purely personal arrangements,¹ the courts have never interfered to prevent corporations or trustees from promoting or opposing bills at their own expense either in their corporate or individual capacity,² and have stated that it would be difficult to conceive a case in which it would be right to exercise the power. Indeed they have declined to intervene even when applications were made not merely with *mala fides*, but in direct breach of solemn engagements, which the courts commented on and condemned.³

265. Where expenses have been incurred by parties in opposing a bill promoted by trustees, the Court will not permit these expenses to be paid out of the trust-funds,

¹ *Heathcote v. North Staffordshire Railway Company*, Feb. and June 1850, 2 Macnaghten and Gordon (Chancery), 100; 20 L.J. (Chancery), 82.

Lancaster and Carlisle Railway Company v. North-Western Railway Company, 12th, 14th, and 18th January 1856, 2 Kay and Johnson (Chancery), 293; 25 L.J. (Chancery), 223.

Per Lord Chancellor Chelmsford in *Steele v. The North Metropolitan Railway Company*, 8th February 1867, L.R. 2 (Chancery), 243.

Stockton, etc., Railway Company v. Leeds, etc., Railway Company, 5th and 7th August 1848, 2 Philip (Chancery), 666-670.

Ware v. Grand Junction Waterworks Company, 15th March 1831.

² *Russell and Mylne* (Chancery), 470, *per* Lord Chancellor Brougham.

³ See *Steele v. North Metropolitan Railway Company*, *supra*.

Cunliffe v. Manchester, etc., Railway Company, 10th February 1831, 2 *Russell and Mylne* (Chancery), 480, *n*.

Ware v. Grand Junction Waterworks Company, *supra*.

Stockton, etc., Railway Company v. Leeds, etc., Railway Company, *supra*.

Heathcote v. North Staffordshire Railway Company, *supra*.

³ *Attorney-General v. Manchester and Leeds Railway Company*, 11th and 23d August 1838, 1 *Railway Cases*, 436.

Lancaster and Carlisle Railway Company v. North-Western Railway Company, 12th, 14th, and 18th January 1856, 2 Kay and Johnson (Chancery), 303; 25 L.J. (Chancery), 223.

Stevens v. the South Devon Railway Company, 8th February 1851, 13 Beavan (Chancery), 48; 20 L.J. (Chancery), 491; 15 Eng. Jurist, 235.

Re London, Chatham, and Dover Railway Arrangement Act, *ex parte* Hartridge and Allender, 29th and 31st May 1869, L.R., 5 Chancery, 671.

Anstruther v. the East of Fife Railway Company, 19th April 1852, 1 Macqueen's Appeals, 98.

See observations by the Lord President (Ingليس) in *Wakefield v. The Commissioners of Supply of Renfrewshire*, quoted in footnote p. 447.

though the effect of the opposition may have been to protect the funds.¹

266. As to the title of ratepayers to prevent public trustees from misapplying the funds or rates under their administration, it is to be observed that in the absence of statutory powers, individual ratepayers are not entitled to sue for any other interest than their own. No one can appear for the community or for other ratepayers. Each ratepayer may resist an illegal tax, but only in so far as regards his own proportion of it. Nor is he entitled to conclude for repetition into the general fund of any expenses which may have been improperly paid by the body of public trustees whose action he challenges. This has been specially held in cases in which individual ratepayers have sought to compel commissioners of police to repay sums paid by them out of the police funds on account of the expense of opposing a bill in parliament.² But a minority of trustees are entitled, as

¹ *Macintosh's Trustees v. Macintosh*, 30th June 1852, 14 D., 928. In this case the magistrates of Inverness, who were trustees of a mortification for educational purposes, applied for an act to extend the operation of the charity by uniting the fund with the funds of the Inverness Academy, under a joint-trust. The bill was opposed, and ultimately abandoned. The successors of the trustees, some of whom had been opponents of the bill, agreed to pay the expenses of the opposition out of the estate. The representatives of one of the families for whose benefit the fund was bequeathed applied for interdict against the proposed payment, and the Court granted the interdict sought, on the principle that the expenses were extra-judicial, were incurred by parties outside of the trust, without any guarantee that the costs would be paid out of the trust-funds, and could not consequently be recovered from the trust-estate when they were incurred.

² *Ewing v. Glasgow Police Commissioners*, 19th January 1837; 15 S., 389; 12 F., 331; affirmed H. of L., 16th August 1839; *M'Lean and Robinson*, 847. In this case the commissioners of police, acting under a local act, passed resolutions authorising the payment out of the police funds of the expenses incurred in successfully opposing a bill in parliament for the union of two water companies which had for some time subsisted in Glasgow, and imposing an assessment for the payment *inter alia* of these expenses. Seventeen persons, designing themselves "residents in Glasgow, or occupiers of property there, and rated in the police books as liable in payment of police assessments under the police act after mentioned, and who have hitherto been assessed accordingly, for themselves, and for those who adhere to them," brought an action for reducing these resolutions as in violation of the act, and for having the commis-

such, to complain of the resolutions of the majority whenever these are in violation of the charter, deed, or statute under which the trust is constituted.¹

sioners ordained to repay (not to the ratepayers, but) into the funds the sums so voted away; and also to have them interdicted from levying these sums." It was held that the pursuers had no such direct or immediate interest as to entitle them to insist in these conclusions. The Lord Justice-Clerk (Boyle) said,—“Now it is plain that there is no direct or indirect conclusion for payment or repetition to any of these pursuers. It may be said they have an indirect or remote interest to have the funds restored. But there is no conclusion for repayment to any of these parties. It is not stated that a higher rate had been laid on them which ought to be repeated, and there is no patrimonial interest brought into view. . . . Then we are driven to their title at common law. It is settled law that no party can conclude for behoof of a community or general body of individuals not incorporated. This point was clearly decided in the case of *Lauder* [reported *Magistrates of Lauder v. Spence*, 17th May 1821, 1 S., 18]. Then can they maintain it on individual interests? I cannot doubt that the principles of the case of *Inverury* [reported *Burgesses of Inverury v. Magistrates*, 14th December 1820, F.C.] are applicable here, and that the individual interest rested on will not afford a title for such actions. The decision in that case was rested on the ground that there was no direct interest, as the acts complained of were not in prejudice of the pursuers themselves individually, but only to the prejudice of the burgh funds; and, though so far indirectly affected, that was not held to afford a sufficient interest. The principle there given effect to is not a rule applicable to burghs only, but a general rule, that a party must set forth a direct and immediate interest.” Lord Medwyn said,—“I agree with the Lord Ordinary that parties may object to an illegal tax so far as regards their own portion of it. But the pursuers do not raise the question here as to the tax on themselves. They have no interest but their own. They cannot appear for the community or other ratepayers—they are only to be looked on as seventeen individuals for their own interest; but they do not seek repetition to themselves, but into the fund. They might benefit by next year's assessment being less, but that is just the sort of indirect interest which does not give a title to persons of a class having common interests. This is not a question of levying, but of misapplying funds levied for another purpose; and the levy for next year is not objected to.”

Morrison v. The Glasgow Commissioners of Police, 13th June 1837, 15 S., 1128; 12 F., 1055; *affd.* 16th August 1839, *M'Lean and Robinson*, 868. Here the circumstances were similar to those in *Ewing's* case, and it was held, in conformity with the decision in it, that residents liable in police assessments had no sufficient title to complain of the resolutions of the commissioners of police; and that parties who, besides being ratepayers, were the minority of the board of commissioners on the occasion of passing the resolutions complained of, but whose character as such was not expressly set forth, were in no better situation as to title.

¹ *Goddard v. The Leith Dock Commissioners*, 14th February 1827, 5 S., 355 (N.E. 329). Here it was held that a member of a board of commissioners elected under authority of an act of parliament is entitled to pursue a reduction of an act done by the board, on the ground of its

The trustees for the time may also sue their predecessors for any misapplications of trust-funds.¹

267. In 1872 the Act 35 and 36 Victoria, cap. 91 (which is known as "The Municipal Corporations (Borough Funds) Act 1872)," was passed "to authorise the application of funds of municipal corporations and other governing bodies in certain cases." This act recites the Acts 20 and 21 Vict., cap. 50, section 92 of the Act 5 and 6 Will. IV., cap. 76,² the Public Health Act, 1848, and the Local Government Act, 1848,—all of which are English acts, and have no application to Scotland,—and sets forth that these and various local acts of Parliament have conferred powers of improving, cleansing, paving, lighting, and otherwise governing places or districts, upon boards of health, commissioners, trustees, and other persons; and that it is ex-

having been carried by the votes of two commissioners who were disqualified, without his being obliged to conclude for reduction of the appointment or commission in virtue of which these persons acted. The Lord Justice-Clerk (Boyle) said,—“If any wrong be done by a majority of commissioners, any member is entitled to bring the matter before this Court for redress, unless expressly excluded by statute.”

Taylor v. Commissioners of Police for Kilmarnock, 5th February 1858, 20 D., 501; 30 Jur., 267. In this case a minority of police commissioners brought a suspension and interdict against a resolution of a majority, on the ground that the resolution was a breach of the police statute. The minority designed themselves ratepayers, and also police commissioners, but did not state that they were a minority. They afterwards brought a declarator, containing various conclusions as to the duties of the commissioners. Their title was objected to, and in respect of the decision in *Morrison v. The Glasgow Police Commissioners*, the Lord Ordinary (Benholme) reported the case to the First Division. The title was sustained. Lord Ivory said,—“This is not at all the case of *Ewing* or *Morrison*. In the former case the ratepayers, and none but the ratepayers, were parties to the action. The case of *Morrison* was held to be identical with *Ewing*, and it could only be so on the footing that the court held that there were none but ratepayers before them, and it is perfectly clear from the report, both in the Court of Session and the House of Lords, that such was the case.” Lord Deas said,—“Where a statutory body has been entrusted with the disposal, for certain purposes, of statutory funds, I think by our law and practice any dissenting member of that body has a title to pursue, in order to prevent the majority from misapplying these funds. We are familiar with this in the case of town councils, and I think the principle applies equally to a body of police commissioners.

¹ See *dictum* of Lord Medwyn in *Ewing v. Glasgow Commissioners of Police*, *supra*.

² See footnote to No. 227 of these Observations, pp. 395-398.

pedient to extend the powers of governing bodies, so as to enable them to apply the borough or other funds under their control towards such costs, charges, and expenses, as may be incurred, for the purposes and in the manner therein provided. It then defines the term "governing body" to mean the council of any municipal borough, the board of health, local board, commissioners, trustees, or other body, acting under any general or local act of parliament, for the management, improvement, cleansing, paving, lighting, and otherwise governing places or districts; and enacts that when, in the judgment of a governing body, it is expedient to promote or oppose any local and personal bill in parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, the governing body may apply the borough fund, borough rate, or other public funds or rates under their control, to the payment of the costs and expenses attending the same; and when there are several funds or rates under their control, the governing body may determine out of which funds or rates such expenses shall be payable, and in what proportions. It is, however, provided that nothing contained in the act shall authorise any governing body to promote a bill for the establishment of any gas or water works, to compete with any existing gas or water company established under any act of parliament; and further, that the power above specified shall not apply in any case where the promotion of or opposition to a bill by a governing body has been decided by a committee of either House of Parliament to be unreasonable or vexatious.¹ No expense in relation to promoting or opposing any bill in parliament, can be thus charged, unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body, at a meeting convened in the manner specified in

¹ Section 2.

the act, and unless such resolution shall have received, in respect of matters within the jurisdiction of the Local Government Board, the approval of such board, and in respect of other matters, the approval of one of Her Majesty's Secretaries of State; and in case of the promotion of a bill in parliament, no further expense must be incurred or charged as aforesaid, after the deposit of the bill, unless the propriety of such promotion shall be confirmed by such absolute majority, at a further special meeting convened in manner directed by the act. It is also provided, that no expense in promoting or opposing any bill in parliament shall be so charged, unless such promotion or opposition shall have had the consent of the owners and ratepayers of the district, to be expressed by resolution in the manner provided in the Local Government Act (1858) for the adoption of that act.¹ The approval of the Local Government Board, or one of Her Majesty's principal Secretaries of State, as the case may be, cannot be given to any such resolution until the expiration of seven days after publication thereof, as provided by the act; and in the meantime, any ratepayer within the district of the governing body may give notice in writing to the Local Government Board, or Secretary of State, objecting to such approval.² All expenses incurred under the act must, before they become chargeable, be examined and allowed by some person to be authorised by one of Her Majesty's principal Secretaries of State, or by the Local Government Board, as the case may be,³ who are empowered to order a local inquiry to be held upon any application under the act, by any person or persons whom they may respectively nominate for the purpose, and to charge the costs and expenses of the inquiry upon the governing body, or the person by whom such application shall be made. Nothing in the act, it is declared, shall be construed to alter or affect

¹ Section 4.² Section 5.³ Section 6.

any special provision in any other act for the payment of the expenses intended to be provided for by the former act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body,¹ or which are or shall be vested in or exerciseable by the inhabitants of any district under any general or special act. Nor do the provisions of the act extend to applications for bills for any object which would, for the time being, be attainable by provisional order.² It is expressly declared that the act shall not extend or apply to Ireland, or the city of London, or the Metropolitan Local Management Act, 1855.³ Scotland is not excluded.

It will be observed that the act proposes to *extend*, not to *limit*, the powers of governing bodies, and that it does not affect any powers which town councils or other governing bodies have, by existing law, to apply their common good or other funds to the payment of the cost of promoting or opposing bills in parliament. The powers of English municipal corporations in dealing with the corporate property, were greatly restricted by the Municipal Corporation Acts,⁴ and have now to be de-

¹ On this provision the Master of the Rolls (Jessel) observed, in the case of the Attorney-General v. The Mayor of Brecon, 14th and 16th December 1878, L.R. 10, Chancery, 223,—“As I read that act of parliament (The Municipal Corporations (Borough Funds) Act, 1872), it very much increases the responsibility of corporations who choose to act in opposing bills in parliament without obtaining the sanction of the ratepayers; because, if unsuccessful, it will be more difficult for them now than it was formerly to show that the expenses ought to have been allowed, inasmuch as they could readily have obtained the sanction which would have protected them from all consequences of want of success. But still I must read the act as I find it; and I find in the 8th section of the act these words, ‘Nothing in this act shall extend or be construed to alter or affect any special provision,’ and so forth, ‘or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exerciseable by the inhabitants of any district under any general or special act.’ The result therefore is, that if the municipal corporation had a power prior to the passing of this act to oppose the bill in parliament, that power is certainly not—to use the words of the act—‘taken away or diminished’ by the recent statute.”

² Section 10.

³ Section 11.

⁴ In the Attorney-General v. The Mayor of Brecon, 14th and 16th December 1878, L.R. 10, Chancery, 204, the Master of the Rolls (Jessel) said,—“There is no doubt that the Municipal Corporations Acts were

terminated with reference to the provisions of these statutes, just as the powers of commissioners of police and other statutory trustees have to be determined with reference to the provisions of the statutes under which they act. There is nothing, however, in the Scotch Burgh Reform Acts, under which royal and parliamentary burghs in Scotland are administered, corresponding to the clause in the English Municipal Corporation Act, 5 and 6 Will. IV., cap. 76, relative to the borough fund.¹ The law as regards royal and parliamentary burghs, and burghs of regality and barony in Scotland, must be determined with reference to the objects for which these institutions were created, and the powers which their magistrates and councils have immemorially exercised. That these have been uniformly regarded as of a very comprehensive character, cannot be questioned.

Apart from that consideration, it has been maintained that the Act 35 and 36 Victoria, cap. 91, does not apply to Scotland. The phraseology and structure of the act no doubt indicate that it was originally intended to apply to England only. The terms "borough fund" and "borough rate" are unknown in Scotland. The Local Government Act, 1858, is limited to England, and its machinery is unsuited to Scotch burghs. But looking to the principles recognised in *Bridges v. Fordyce*,² it seems difficult to hold that Scotland is excluded from the operation of the statute. The question

intended to impose great restrictions on the dealings by municipal corporations with the corporate funds. In substance, whatever the words used were, the Municipal Corporations Act, 1835, reduced municipal corporations from the position of owners of property to the position of trustees of property. Instead of having the power which such corporations possessed before the passing of the act—and sometimes abused—of disposing of their property pretty well in any way they thought fit, they were restricted to certain definite purposes pointed out by the 92d section of the act, that being the principal section, and the other being merely ancillary. In substance, as I have said, they were reduced to the position of trustees," p. 215.

¹ See footnote to No. 227 of these Observations, pp. 395-399.

² *Bridges v. Fordyce*, 7th March 1844, 6 D., 968; 16 Jurist, 428; affd. H. L., 23d February 1847, 6 Bell's App., 1; 19 Jurist, 322.

was directly raised in *Macdonald v. The Perth Water Commissioners*,¹ but was not authoritatively decided, though the Lord Justice-Clerk said he inclined to the opinion that the statute applies to Scotland. It may be observed that while Earl Redesdale, Chairman of Committees in the House of Lords, has required all English bills promoted since the act was passed to contain a recital in the preamble of compliance with its provisions, he has not required such a recital in Scotch bills. Compliance with the provisions of the act does not require to be proved with reference to the latter.²

¹ 17th June 1879. The facts of the case are referred to in footnote to p. 446. In delivering his judgment, the Lord Justice-Clerk (Moncreiff) said: "When the expenses which are the subject of this action were incurred, there was, and still is, in operation a statute regulating the manner in which water commissioners in the position of the defenders might render such expenditure a charge on the rates under their administration. The statute is the 35th and 36th Vict., c. 91, and if it extends to Scotland, its provisions are conclusive in this dispute. The Lord Ordinary says in his note that it was not founded on in defence to this action. I do not well see how it could be, for the defenders did not adopt any part of the procedure which is required by the statute before such outlay can become chargeable; and therefore if the statute extends to Scotland the defence must fail. Now, there are no words excluding Scotland from its provisions. Ireland is specially excluded; and the statute deals with interests which are the same on either side of the border. The only reason for supposing that it was not meant to extend to Scotland is that it is drawn with such exclusive reference to English legislation, and English institutions and procedure, that although it would be easy enough to find equivalents in our own usages for these English requisites, it would be difficult, if not impossible, to follow out in Scotland the precise injunctions of the act. It is not the part of the judge to criticise the acts of the Legislature, but I do not, I think, transgress due limits if I say that it is unfortunate that our public bodies and our courts of law should be put to solve questions such as these, when a little ordinary care and inquiry on the part of those by whom such English acts are framed would prevent them from arising. There were only two courses which ought to have been followed—either to introduce a clause excluding Scotland, or to have provided proper machinery for its operation in Scotland. I incline to the opinion that the statute applies to Scotland, because its object is general, and there are no words to exclude, and no reason for excluding, Scotland from its operation, although I see great difficulties in the way of its practical application. I am glad, however, to be saved the necessity of placing my judgment on this ground, as, apart from the statute, I am of opinion that the judgment of the Lord Ordinary is well founded." The other judges concurred. [16 Scot. Law Rep., p. 619.]

² The act has been found to be very onerous and expensive in England, and the larger boroughs have long been desirous to have it

268. It has been seen that the statutes relating to royal and parliamentary burghs, and the general police acts of 1850 and 1862, contain a variety of special provisions as to the mode in which the business of magistrates and councils, and commissioners of police, acting in the execution of these several statutes, must be conducted. These provisions, and any regulations in regard to such matters to be found in the charters or statutes, local or general, under which each body may be acting, or even in the standing orders or bye-laws which it may competently enact, for securing the deliberate and orderly transaction of its business, should be strictly observed. Reference has already been made to several matters which should receive attention in elections and other proceedings; and occasionally it has been seen that departure from strict rules of procedure has led to embarrassment afterwards. On this subject the decisions in the English courts are more varied and instructive than those in the Scotch courts; and though, possibly, the principles recognised in England would not be invariably recognised in this country, a general acquaintance with the rules which the courts both of England and Scotland apply to the conduct of public business, can scarcely fail to be useful. The following observations are accordingly offered:—

(1.) Meetings are either ordinary or extraordinary. Ordinary meetings are usually held at stated times for the transaction of general business. When these times are fixed by statute,¹ the meetings are called statutory meetings. Extraordinary meetings, or, as they are fre-

amended. The bill was originally introduced for the benefit of boroughs, and to remove such hardships as were illustrated by the case of *The Queen v. The Mayor of Sheffield* [referred to in footnote, p. 397], but it was materially altered in parliament, clauses having been introduced at the instance of railway, gas, and water companies, which throw serious difficulties in the way of governing bodies interfering with the interests of these companies. It has also been found that the expense of taking the poll of the ratepayers, which the act prescribes, is sometimes as much as the whole cost of promoting and obtaining the desired legislation.

¹ See Nos. 242 and 243 of these Observations.

quently called, special meetings, or *pro re nata* meetings, are held when occasion requires, for the transaction of particular business, which ought to be specified in the notice of the meeting. No business can be validly transacted at an extraordinary meeting except that for which it was convened, and which is stated in the notice, unless all the persons entitled to be present and take part in the proceedings consent.¹ Business done at an extraordinary meeting in disregard of this rule, cannot be validated by subsequent confirmation at an ordinary meeting, unless the business might have been originally transacted at an ordinary meeting without previous notice.² The same meeting may be both ordinary and extraordinary, —ordinary for the transaction of usual business, and extraordinary for the transaction of particular business, of which special notice has been given.³ When an ordinary meeting is adjourned, the adjourned meeting continues to be an ordinary meeting, though special notice may have been given that it is to be held for the transaction of special business.⁴ But unless such special notice is given, no business may be transacted at an adjourned meeting except the unfinished business of the former meeting.⁵

(2.) When the charter, deed, or statute, under which the body acts, appoints certain meetings to be held on specified days for the transaction of certain business, it would appear not to be necessary to give notice of these meet-

¹ *Bridport Old Brewery Company*, 12th January 1867, L.R., 2 Ch., 191.
Imperial Bank of China v. Bank of Hindostan, 6th and 7th May 1868, L.R., 6 Equity Rep., 91.

Anglo-Californian Gold Mining Company v. Lewis, 16th November 1860, 6 Hurlstone and Norman (Exchequer), 174.

Stearic Acid Company, 23d July 1863, 9 Eng. Jurist (N.S.), 1066.

But as regards special meetings of commissioners of police, see No. 244 of these Observations.

² *Lawes Case*, 10th and 17th March 1852, De Gex, Macnaghten and Gordon (Chancery), 421.

³ *Cutbill v. Kingdom*, 10th November 1847, 1 Exchequer Rep., 494.

Graham v. Van Dieman's Land Company, 29th November 1856, 1 Hurlstone and Norman (Exchequer), 541.

⁴ *Wills v. Murray*, 29th and 30th January 1850, 4 Exchequer Rep., 843.

⁵ *The Queen v. Grimshaw*, 5th June 1847, 10 Q.B., 747.

ings to the parties whose duty it is to be present unless such notice is specially prescribed, or unless it is proposed to transact other business than that specified in the charter, deed, or statute.¹ Every member of the body must be presumed to be acquainted with its constitution, and to know the time and business to be transacted at such meetings.² But even as regards these meetings, notice should be given to remind members. As regards all other meetings, notice must be given to every person entitled to attend, in order that he may have an opportunity of taking part in all the proceedings;³ and the omission to send such notice to any one who is of sound mind,⁴ though he may have given a general dispensation of notice, and though the omission may be accidental,⁵ will invalidate the proceedings.⁶ When the business has been entered upon at a regular meeting, no fresh notice of the adjourned meeting seems to be necessary.⁷ Though the notice may not have been given in the precise form in which it should have been given, yet if all the parties entitled to receive notice actually got it, the proceedings are not necessarily invalid.⁸ If all the

¹ *Per* Mr. Justice Coleridge in the *Queen v. Grimshaw*, *supra*.

² *The King v. Trevenan*, 1819, 2 Barnewall and Alderson (K.B.), 339. See *The King v. Hill*, October and November 1825, 4 Barnewall and Cresswell (K.B.), 426.

³ See as to commissioners of police, No. 156 of these Observations.

⁴ Brice on *Ultra Vires*, (2d ed.), p. 38, and case of *Stebbins v. Merritt*, 10 Cush., 27, therein referred to.

⁵ *The King v. Langhorne*, 23d January 1836, 4 Adolphus and Ellis (K.B.), 538.

⁶ *Ibid.*

The King v. Chetwynd, 8th February 1828, 7 Barnewall and Cresswell (K.B.) 695.

See *Moore v. Hammond*, 5th May 1827, 6 Barnewall and Cresswell, K.B., 456.

Bridport Old Brewery Company, 12th January 1867, L.R., 2 Chancery, 191.

⁷ *The King v. Harris*, 25th January 1831, 1 Barnewall and Adolphus (K.B.), 936.

As to whether it is necessary to give notice of an adjourned meeting to those who attended the original meeting, see *Wills v. Murray*, *supra*.

⁸ *The King v. Chetwynd*, *supra*.

British Sugar Refining Company, 16th, 18th, 27th February 1857, 26 L.J., Ch., 369; 3 Kay and Johnson (Chancery), 408.

persons entitled to be present at any meeting are actually present, though some of them may not have received notice, and no objection on the ground of informality is taken, the proceedings will not be invalidated on the ground of want of notice.¹ And even if parties who did not receive notice to attend, and were not present, acquiesce in the proceedings, they cannot afterwards object to want of notice.²

(3.) The requisites of the notice to be given must be determined by the charter, deed, or statute under which the body acts, or by the standing orders or bye-laws of the body, or by the usual and recognised custom. It will generally specify, and in the absence of other regulation should specify, the day, hour, and place of meeting, and the business to be transacted. A full and correct specification of the business to be considered at extraordinary meetings is indispensable, and failure in this respect has not unfrequently invalidated the business done at such meetings.³ No business can be transacted at extraordinary meetings, except that for which it was convened, and which is stated in the notice, without the consent of all parties entitled to be present and to take part in the proceedings. But the transaction of other business will not invalidate what was done in terms of the notice.⁴ Nor will a meeting be invalidated as regards business

¹ *The King v. Chetwynd, supra.*

Re British Sugar Refining Company, supra.

² *Turquand v. Marshall*, January and February 1869, L.R., 4 Chancery, 376.

Evans v. Smallcombe, May and June 1868, L.R., 3 E. and I., 249. See also *Phosphate of Lime Company v. Green*, 11th November 1871, L.R., 7 C.P., 43.

³ *Wills v. Murray, supra.*

Re Bridport Old Brewery Company, supra.

Re Silkstone Fall Colliery Company, 19th November 1875, 1 Chancery Division, 38.

⁴ *Re British Sugar Refining Company, supra.*

Graham v. Van Dieman's Land Company, 29th November 1856, 1 Hurlstone and Norman (Exchequer), 541, 26 L.J. (Ex.), 73.

Re Irrigation Company of France ex parte Fox, 16th and 10th January 1871, L.R., 6 Chancery, 176.

competently transacted by reason of the notice specifying other items of business which are *ultra vires*.¹ When a meeting is convened to confirm a resolution passed at a previous meeting, the notice should state the resolution, or the import of it.² The length of notice to be given of various kinds of meetings is usually fixed by the charter, deed, or statute under which the body acts, or by its standing orders or bye-laws, or by recognised custom. When no time is fixed, reasonable notice must be given. Meetings of town councils of royal and parliamentary burghs to elect councillors and magistrates *ad interim*, it has been seen must be called on five days notice.³ The General Police Acts of 1850 and 1862 require notice of all meetings of commissioners, special and statutory, to be given by written or printed notices at least twenty-four hours before the time of meeting.⁴ Special meetings must be called by the clerk forty-eight hours after he is required to do so, and must be held within four days after the requisition.⁵ All notices or intimations required to be given in royal and parliamentary burghs, of meetings or proceedings in regard to elections under the Acts 3 and 4 Will. IV., caps. 76 and 77, must, when not otherwise directed, be given by the town-clerk.⁶ In any parliamentary burgh in which there is no town-clerk, the notice must be given by the sheriff-clerk of the county. The nature of the notice to be given of ordinary meetings is not prescribed by statute. The general police acts of 1850 and 1862 appoint notices of ordinary meetings of commissioners to be called in the manner specified in No.

¹ *Cleve v. Financial Corporation*, 28th June, 1st-4th July 1873, L.R., 16 Equity, 363.

² *Dean v. Bennett*, 21st and 22d February 1870, L.R., 6 Ch., 489, S.C., 9 Equity Reports, 625.

³ Section 25 of 3 and 4 Will. IV., cap. 76, and section 23 of 3 and 4 Will. IV., cap 77. No. 171 of these Observations.

⁴ See No. 156 of these Observations.

⁵ Section 43 of the General Police Act of 1850, and section 60 of the General Police Act of 1862. No. 243 of these Observations.

⁶ Section 29 of 3 & 4 Will. IV., cap. 76, and section 27 of 3 & 4 Will. IV., cap. 77.

156 of these Observations. In the absence of express provision in the charter, statute, or deed under which the body is administered, the notice of meetings should be given in the way prescribed by the standing orders, or bye-laws, or in accordance with the usual and recognised custom. It has been held in England that when a special mode of summoning to corporate meetings had been fixed by long usage, that mode must be adopted, otherwise the meeting would be irregular, and the acts done at it invalid, even though personal notice had been given to the members entitled to attend.¹

(4.) Persons who have received regular notice of a meeting, and might have attended, but fail to do so, are bound by what is done at it, in so far as the business transacted fell within the competency of the meeting. It has also been held that shareholders of commercial companies who receive the reports of the business transacted at meetings, and do not object to what has been done, must be considered as acquiescing, provided the business transacted was within the competency of the meeting. If *ultra vires*, it cannot be validated by mere acquiescence.²

(5.) All meetings should be held in the usual place, or in a place regularly appointed for the purpose, and notified by competent authority. Such appointment may be made for sufficient cause by the body itself,³ or

¹ *The King v. May*, 1770, 5 Burrows (K.B.), 2682.

The King v. Langhorne, 23d January 1836, 4 Adolphus and Ellis (K.B.), 538.

² *Phoenix Life Assurance Company's Case*, 10th and 11th July 1862, 2 Johnson and Hemming (Chancery), 441.

Irvine v. The Union Bank of Australia, 6th, 7th, 8th, and 10th March 1877, 2 App. Cases, 366.

Compare *Evans v. Smallcombe*, May and June 1868, L.R., 3 E. and I., 249.

Spackman v. Evans, May and June 1868. *Ibid.* 171.

Houldsworth v. Evans, 25th and 26th June 1868. *Ibid.* 263.

Phosphate of Lime Company v. Green, 11th November 1871, L.R., 7 C.P., 43.

Bonnington Sugar Refining Company v. Thomson's Trustees, 25th October 1878, 6 Rettie, 80; affd. H. of L., 20th June 1879.

³ See footnote 3, p. 237.

probably by the chairman, as an incident to the power of adjournment.¹ A meeting held elsewhere than in the usual place, though attended by a majority of those entitled to be present, unless the change of place has been made by competent authority, or in consequence of a legal adjournment to it, is open to objection; and an election made in such a place has been held to be invalid in consequence, though otherwise legally conducted.²

(6.) When the charter, statute, or deed under which the council, commissioners, or other body are constituted or act, does not prescribe the number of members who are to form a quorum, and be entitled to transact business, a majority of the whole members must be present at every meeting duly called, and no meeting at which a quorum is not present can validly transact any business.³ The Acts 3 and 4 Will. IV., caps. 76 and 77, contain no provisions as to a quorum. A majority, therefore, of the whole magistrates and council of royal and parliamentary burghs must attend every meeting at which business is transacted.⁴ The General Police Acts of 1850 and 1862 provide that one-third of the whole commissioners must be present at meetings to constitute a quorum.⁵

(7.) Municipal corporations have, as an incident, the

¹ *The Queen v. Hedger*, 1st June 1840, 12 Adolphus and Ellis (Q.B.), 159.

The King v. The Mayor, etc., of Carmarthen, 3d July 1818, 1 Maule and Selwin (K.B.), 704.

² *The King v. May*, 1770, 5 Burrows (K.B.), 2681.

Musgrave v. Nevinston, Easter Term, 10 Geo. II., Strange (K.B.), 584, L. Raymond, 1358.

³ *Howbeach Coal Company v. Teague*, 12th January 1860, 5 Hurlstone and Norman (Exchequer), 151.

Sharp v. Dawes, 21st November 1876, 2 Q.B.D., 26.

⁴ See footnote 2 to No. 137 of these Observations, p. 238.

⁵ See No. 156 of these Observations.

The English Municipal Corporations Act, 5 and 6 Will. IV., cap. 76, enacts that all acts of the council shall be done and decided by a majority of the members present at any meeting, the whole number present not being less than one-third of the council [Section 69]. This provision, however, it is believed, does not overrule the express words in sections which require certain things to be done by the majority or two-thirds of the whole council, e.g., sections 31 and 90.

power to make such bye-laws as are requisite for the due management of their affairs. This power is also frequently given to commissioners or public bodies by the statute which creates them and defines their duties and powers, and in such cases the bye-laws so made require the confirmation of some specified authority. In all cases, however, bye-laws must not be at variance with the statute or common law, or with the charter or deed under which the corporation or body is constituted or acts,¹ and must be reasonable and properly adapted to execute the objects for which the corporation or body is constituted.² Bye-laws not warranted by the authority which empowers them to be made are invalid.³

(8.) When the charter, statute, or deed under which the body is constituted or act, directs anything to be done by a majority, or by any specified number, it is not competent to alter that direction by any standing order or bye-law of the body, to the effect of declaring that the majority shall be anything else than a simple majority, or that any number, greater or less, than the number specified in the charter, statute, or deed, shall be requisite for the doing

¹ See *Dunston v. Imperial Gas Company*, 1832, 3 Barnewall and Adolphus, K.B., 125.

Elwood v. Bullock, 1844, 6 Q.B., 383.

Everett v. Grapes, 23d January 1861, 3 L.T. (N.S.), 669.

Shellito v. Thomson, 17th November 1875, 1 Q.B. D., 12.

² *The King v. Cutbush*, 30th April 1768, 4 Burrows (K.B.), 2204.

Hoblyn v. The King (in err.), 7th May 1772, 2 Brown's Parliamentary Cases, 329.

Tucker v. The King (in err.), 1st December 1742, 2 Brown's P.C., 304.

The King v. Ginever, Trinity Term, 1796, 6 Term Reports, 732.

The King v. Breton, 26th November 1768, 4 Burrows (K.B.) 2260.

Per Mr. Justice Yates in the King v. Spencer, 29th January 1766, 3 Burrows (K.B.), 1839.

Mayor, etc., of Oxford v. Wildgoose, Hilary, 2 W. and M., 3 Levinz (K.B.), 298.

The King v. Phillips, Trinity, 1748, cited 3 Burrows, 1325.

³ See *Calder, etc., Navigation Company v. Pilling*, 23d April 1845, 14 Meeson and Welsby (Exchequer), 76.

Adley v. Whitstable Company, 9th and 12th November 1810, and 8th February 1815, 17 Vesey Jr. (Chancery), 315; 19 *ib.*, 304; and 1 Merivale (Chancery), 107.

of the act. In like manner, when the charter, statute, or deed does not confer a right on the chairman or preses to give a casting vote, in case of equality of votes, this cannot be given by any standing order or bye-law.¹ No one can give a larger right than he himself possesses.² Town councils of royal burghs and burghs of regality and barony in Scotland were in the practice, from the earliest times, of making and enforcing bye-laws for compelling, by means of fines, the attendance of members at meetings. For this purpose the roll was appointed to be called at specified times, and those who failed to answer were subjected to pecuniary penalties. This practice, at least in the larger burghs, seems to have fallen into disuse since the passing of the Burgh Reform Act. It has been held in England that a corporation has power to make and enforce such bye-laws.³

(9.) It has been seen that the Acts 3 and 4 Will. IV., 76 and 77, and 15 and 16 Vict., cap. 32, provide for casting votes being given in cases of equality of votes in elections in royal and parliamentary burghs,⁴ and that the General Police Acts of 1850 and 1862 contain similar provision as regards all meetings of commissioners under these statutes.⁵ In all cases, however, in which the right to give a casting vote is not conferred by the charter, deed, or statute under which the body is constituted or acts, or has not been acquired, as it may be acquired, by prescription, it cannot be given, casting votes having no sanction from the common law.⁶ When, therefore,

¹ *The King v. Giniver*, Trinity Term, 1796, 6 Term Reports, 237.

The King v. Bumstead, 1831, 2 Barnewall and Adolphus, K.B., 699.

² See *dictum* of Mr. Justice Park in *the King v. Bumstead*, 2 Barnewall and Adolphus, K.B., 704.

³ *Tobacco Pipe-Makers' Company v. Woodroffe*, Trinity, 1826, 7 Barnewall and Cresswell (K.B.), 838.

⁴ See sections 17, 24, and 25 of 3 and 4 Will. IV., cap. 76; sections 13, 14, 15, 16, 17, 22, and 23 of 3 and 4 Will. IV., cap. 77; and sections 6 and 8 of 15 and 16 Vict., cap. 32.

⁵ See No. 156 of these Observations.

⁶ 15 Viner's Abridgment, 184, pl. 8. *The Queen v. Chapman*, 15 Viner's Abridgment, 214, pl. 4.

ticular act,—other than an election, which is subject to different rules, and to which reference will afterwards be made,—is required to be performed by the majority of a body, *e.g.*, the imposition of a rate, and the majority refuse to perform it, such refusal does not entitle the minority to perform it. All that the minority are called upon to do in such circumstances is to evince their readiness to discharge their duty. If outvoted, the responsibility for the neglect will rest with the defaulting majority. The opposite of this doctrine was held by the Court of Queen's Bench and by the Exchequer Chamber in England in the case of *Gosling v. Veley*,¹ where, on the analogy of the principles applicable to elections, it was held that the resolution of a majority of a vestry not to make a legal rate for the repair of a church must be held in law to be equivalent to a withdrawal by the majority from all interference in the matter, so that they virtually became absent from the meeting, and left the power of

interfere upon the question whether a church rate shall be made, and quiescently leave the whole matter to be managed by the other assembled parishioners, there can be no doubt that the quiescent majority would be bound by a rate made by the minority. Such a result can hardly be said to follow in the second case; and to presume absence and non-interference would be to presume against facts.

¹ *Gosling v. Veley*, *supra*. In this case a meeting of churchwardens was held to impose a rate for the repair of a church. A vote of two shillings was proposed, and was met by an amendment stating an objection to church rates in general, and refusing to make any rate. On a vote the amendment was carried. The chairman then asked whether any further proposition as to the amount of the rate was to be made, to which no affirmative answer was returned. Thereupon the churchwardens and other members of the meeting, being a minority present, made a rate. The Court of Queen's Bench held—(1) That the persons voting for the amendment must be considered as having declined to join in the proceedings of the meeting, the amendment having no reference to the object for which the vestry was summoned under monition; that the persons so voting, therefore, left the question in the hands of the remainder; and that the rule was legally made. (2) That it was unnecessary again to put the rate formally to the vote, inasmuch as it had been in effect taken into consideration, and negatived by the amendment; though it would have been more regular not to put the amendment. The House of Lords, however, reversed this decision, and that of the Exchequer Chamber, sustaining the validity of the rate, and held in conformity with the law as stated in the text.

imposing the rate in the hands of the minority.¹ The judgments of these courts were, however, reversed by the House of Lords, who held that the cases applicable to elections ought not to be deemed to be authorities in regard to the making of church rates, and that the refusal of the majority of the meeting to make a rate, even when it is their duty, and they are lawfully required to do so, does not entitle the minority to make the rate. The House of Lords further laid down the following propositions, viz.:—(1.) That an irrelevant vote on a proposition submitted to a meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. (2.) That if the majority of a meeting pass a resolution refusing a rate, that does not disentitle the persons composing the majority to vote on the question of any particular proposal for a rate made by any of the minority; and (3.) That if a rate be made by the minority alone, the votes of the other persons present not having been taken on it, such rate will be void.

A majority must be made up by the votes of the persons present at a regular meeting duly constituted, for it is contrary to the common law for a member of a corporate body to vote by proxy or substitute.

(13.) As regards elections, if a candidate be proposed and seconded after it has been resolved to proceed with an election, he will be held to be duly elected if no other candidate be proposed; or, if two or more candidates are proposed, the one who has the majority of those who vote will be held duly elected, though in either case the majority abstain from voting, and afterwards dissent from or protest against the election. The principle involved in this rule seems to be that the majority of the corporators actually voting constitutes the elective body, whatever may be the number of electors required to be present to constitute a good

¹ Grant on Corporations, p. 71.

meeting.¹ The only way in which the majority can make their opposition to any candidate effectual, after the election has commenced, is by proposing another duly qualified candidate and voting for him.²

¹ In *Oldknow v. Wainwright*, *infra*, Mr. Justice Wilmot cited the case of the *King v. Withers*, Pasch., 8 G. II., B. R., 2 Burrows, 1020, where five electors had voted and six refused to vote, and the Court held that the six had virtually consented. What the objection to the election was, only appears by inference. It would seem to have been that the candidate had not received the affirmative votes of the majority of the elective body. It does not appear that any elector voted against him, or for any other candidate; and it being cited as an authority for the decision then about to be given in *Oldknow v. Wainwright*, the inference is, that it was considered to establish the principle stated in the text.

² *Taylor v. The Mayor of Bath*, Michaelmas, 15 Geo. II., 3 Luder Elec. Cases, 324. This case related to the election of common councilmen for the corporation of Bath. The elective body consisted of the major part of the mayor, the recorder, the aldermen, and common councilmen. A meeting of twenty-seven electors was held; three candidates were proposed; Taylor, Begg, and Kingston. Begg was not qualified, and before the election notice was given of his disqualification. Begg polled 14 votes, Taylor 13, and Kingston 1. The question turned upon Taylor's election; upon a motion by Taylor for a *mandamus*, the Court held Taylor duly elected, on the ground that the votes for Begg, after notice of his disqualification, were thrown away, and did not operate as a negative against Taylor. In this case a distinction was attempted to be drawn between not voting at all and voting for a disqualified candidate. It was admitted that silence might be regarded as equivalent to consent, but that voting for another candidate, though disqualified, was an express negative. The Court, however, overruled the distinction. To vote for a person not qualified, they held to be the same thing as not to vote at all, which it was admitted might have been a constructive assent.

Oldknow v. Wainwright reported in association with the *King v. Foxcroft*, 10th June 1760, 2 Burrows (K.B.), 1017; W. Blackstone (K.B.), 229. This case was instituted to try the validity of the election of one Seagrave to the office of town-clerk of Nottingham. At a meeting of twenty-one corporators, Seagrave was the only candidate put in nomination for the office. Only nine of the corporators voted, and all voted for Seagrave. After the election had begun, and after votes had been polled for Seagrave, eleven of the corporators protested against the election proceeding, upon the ground that the office was filled by Foxcroft. The protest was disregarded, and the mayor declared Seagrave duly elected. He was thereupon sworn in, and was held to be well elected, it having appeared that Foxcroft was not well elected. In giving judgment, Lord Mansfield said that "the electors who protested had no right to stop in the middle of an election; that there was no question of adjournment; that the protesting electors had no way to stop the election when once entered upon, but by voting for some other person than Seagrave, or at least against him, whereas they had only protested against an election." He also said, "Whenever electors are present and do not vote at all, as they have done here, they virtually acquiesce in the election made by those who do vote."

It has been maintained that when an election has to be made, it is not competent to give a simply negative vote against proceeding with it, and that the only way of preventing the election of a candidate who may be proposed, is to nominate and vote for another duly qualified. But this doctrine, which seems to have received the sanction of Justices Page, Chappell, and Wright in the case of *Taylor v. The Mayor of Bath*, appears to have been repudiated by Lord Mansfield in the case of *Oldknow v. Wainwright*; and, in the *King v. Monday*,¹ he observed that while this was the rule in parliamentary elections, it did not hold in corporate elections. And Lord Truro, who delivered the judgment of the House of Lords in *Gosling v. Veley*, in reviewing the judgments in the several election cases therein cited, rather appears to hold that, when a corporate body is met for the purpose of an election which is not prescribed by charter or statute, it is not incompetent to move either the adjournment of the election, or that it be not proceeded with, or that certain persons who have been nominated be not elected, and that electors who vote for any of these amendments do not lose their right to vote in subsequent stages of the election. While, therefore, a majority or other prescribed number of electors may need to be present to constitute a good meeting for purposes of election, and while at such meeting the votes of a minority may be sufficient to elect a particular candidate, provided the majority offer no active opposition, but are simply quiescent; and while a mere dissent or protest against the election of a particular candidate, after the election has begun, does not constitute active opposition, it would seem that, as regards elections not prescribed by charter or statute, the majority may competently resolve not to proceed with it, or may by a simply negative vote refuse to elect certain nominated candidates. Where, however, an election is prescribed by charter or statute, and has to be made at a

¹ 25th January 1777, Cowper (K.B.), 530.

particular time, it appears to the writer that the rules stated by Lord Denman, C.J., in *Gosling v. Veley*, apply,¹ and that it would not be competent for the majority to stop the election by resolving either not to elect or to adjourn the election.

(14.) Votes given for a candidate who is disqualified from being elected, are thrown away if, at the time they were given, the electors who gave them knew of the disqualification. In such a case the candidate who has the majority of good votes is held to be duly elected, however greatly the number of votes thrown away may have exceeded the number of good votes which alone determine the election. But for this rule, a majority might always defeat an election by constantly voting for a disqualified person.²

¹ In the case of *Gosling v. Veley*, the Lord Chief-Justice Denman thus stated the law in regard to elections:—"He, the elector, is present as an elector; his presence counts, as such, to make up the requisite number of electors, where a certain number is necessary; but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as elector; he can speak only in a particular language; he can do only certain acts; any other language means nothing; any other act is merely null; his duty is to assist in making an election. If he dissent from the choice of A., who is qualified, he must say so by voting for some other *also qualified*: he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only; and but for this rule, the interest of the public, and the purpose of the meeting, might both be defeated by the perverseness or the corruption of electors, who may seek some unfair advantage by postponement. If, then, the elector will not oppose the election of A. in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing he voluntarily leaves unopposed, i.e., assents to the voices of the other electors."

² *Taylor v. The Mayor of Bath*, *supra*.

The King v. Hawkins, 5th July 1808, 10 East (K.B.), 211. On appeal, 2 Dow's Rep., 124.

The King v. Parry, 20th November 1811, 14 East (K.B.), 549.

Claridge v. Evelyn, 27th October 1821, 5 Barnewall and Alderson (K.B.), 81.

The King v. Hiorns, 30th January 1838; 7 Adolphus and Ellis (Q.B.), 960.

The King v. Boscawen, referred to in the *King v. Monday*, 25th January 1777; Cowper, K.B., 537.

On the same principle it appears to have been held in England that

When the disqualification can be instantly verified, and is of a nature that every one can understand, it is enough that the elector knew of it before he voted, in order to the vote being dealt with as a nullity. Thus if the candidate has died, or is an infant or an alien, or a convicted traitor, notice, and even knowledge without notice, of the fact is sufficient.¹ But there may be cases in which the grounds of disqualification are neither proved nor admitted nor notorious, and are not capable of immediate ascertainment. In such cases the votes given for the candidate objected to will, notwithstanding notice, not be held to have been thrown away, even though the candidate be held to be disqualified. The election will be declared void, but a new election will be ordered.²

In order to secure the absolute nullity of votes given for a disqualified candidate, and possibly to avoid the expense and inconvenience of a second election, notice of the disqualification, and of the grounds upon which it rests,

where the majority of a corporation wilfully absent themselves from a meeting regularly called for the purposes of an election, the minority may, by a majority of those present at the meeting, make a valid election,—the absent majority being held to have delegated to the minority the right of voting for them.—[Case of St. Saviour's, Southwark. Lane (Exchequer), 21. Merewether and Stephen's History of Boroughs, 2249.] Lord Cunningham indicated a similar view in the case of *Fraser v. Rose* [6th July 1837, 15 S., 1520], in reference to elections to supply vacancies in town councils of royal burghs in Scotland, under the 25th section of 3 & 4 Will. IV., cap. 76. [See No. 173 of these Observations.] But see the opinion of Mr. Watson and Mr. Balfour, quoted in footnote, p. 292.

In the case of *Charitable Corporation v. Sutton*, 13th August 1742, 2 Atkyn (Chancery), 405, Lord Chancellor Hardwicke said,—“If some persons of a corporation are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others.” See also the *dictum* of C.J. Tindal in *Rutter v. Chapman*, 24th May 1841, 8 Meeson and Welsby (Exchequer), 99.

¹ *The King v. Hawkins*, *supra*.

Trench v. Nolan, 6th, 7th, and 11th June 1872, Irish Reports, 6 Common Law, 464.

² *Second Cheltenham Case*, 1848, Power, Rodwell, and Dew, Election Cases, 234. *The King v. Hawkins*, 5th July 1808, 10 East (K.B.), 211; on appeal, 2 Dow's Rep., 124. *Norwich Case*, 15th January 1869, *per* Mr. Baron Martin, 1 O'Malley and Hardcastle, Election Cases, p. 11. *The Queen v. The Mayor, etc., of Tewkesbury*, 13th June 1868, L.R., 3 Q.B., 629.

should be given to the electors before the vote or poll is commenced. When practicable, this should be done by a written or printed notice, served upon or transmitted by post to every elector, evidence being retained of the special manner in which each notice was given.¹ When notice cannot be given to each individual elector, the same object may be attained by giving public intimation of the disqualification in the newspapers,² or by placards posted on prominent places near, and on the way to the poll.³ It is not indispensable, however, that the notice be given before the election commences. It may be given at any time during the election, but will only invalidate the votes given afterwards by the electors who knew it.

Votes are also held to be thrown away when given for more candidates than there are vacancies to be supplied. If, for example, in an election to supply a single vacancy three persons were proposed, and a minority of the elective body voted for A., while a majority voted for B. and C., A. would be held to be duly elected, and the votes given for B. and C. would be held to be thrown away. The Ballot Act recognises this principle, by enacting that when a voter votes for more candidates than he is entitled to, his ballot paper shall be rejected, and his whole vote considered null.

(15.) In the absence of regulation by statute, or charter, or deed of constitution, each body, it is thought, may determine the mode in which the votes of those entitled to elect its officers shall be taken; and it is desirable that the precise mode of conducting elections should be fixed by the standing orders or bye-laws of the body, care being taken that these do not infringe the general law or the special provisions of the statute under which the body acts.

¹ Wakefield, 1842, Barron and Austin, *Election Cases*, 319. Cork County, 1835, Knapp and Ombler, *Election Cases*, 406.

² Galway County, 1st April 1872, 2 O'Malley and Hardcastle, *Election Cases*, 46.

³ Belfast, 1838, Falconer and Fitzherbert, *Election Cases*, 603.

It has already been seen that, in the election of magistrates and officers of police commissioners, vote by ballot is illegal.¹ The Lord Justice-Clerk (Boyle) said, in the case of *Watson v. The Glasgow Police Commissioners*,² that such a mode of voting was opposed to the common law. In England, also, all secret modes of voting which are not expressly authorised by statute or by the charter or constitution of the body, seem to be objectionable on the ground that they create almost insuperable difficulty to the upsetting of such elections as may be challenged in respect of disqualification of the electors, or of objection to particular votes.³ It has accordingly been held in England that voting by giving in the name of the candidate voted for, without the name of the person voting, is illegal.⁴

(16.) Election means the due and regular selection of one or more persons from a greater number who are eligible and capable of performing the duties of the office to which he or they may be elected.⁵ Thus it has been held that the election to an annual office of a person who was out of the country, and who, it was known, would not return in time to perform the duties of the office, was void, and a new election was ordered.⁶

(17.) No election should be made to an office until it is actually vacant. It has been held in England that a valid election cannot be made till the vacancy has occurred,⁷ and the reason for this is stated to be that as the crown has no reversion of an office, and cannot grant

¹ See No. 146 of these Observations, footnote, p. 251.

² *Watson v. The Glasgow Police Commissioners*, 10th March 1832, 10 S., 481; 7 F., 370.

³ See *the King v. Jefferson*, 23d November 1833; 5 Barnewall and Adolphus (K.B.), 855. *Faulkner v. Elger*, 1825, 4 Barnewall and Cresswell (K.B.), 455, 457.

⁴ *Faulkner v. Elger*, *supra*.

⁵ *The King v. The Mayor of Cambridge*, 27th January 1767, 4 Burrows (K.B.), 2010.

⁶ See *The King v. The Mayor of Lyne (Mitchell's Case)*, 8th February 1779, Douglas (K.B.), 85.

⁷ *Owen v. Stainhoe, Pasche*, 34 Car. II., T. Jones' Rep.

it by that name, much less can a corporation, which are grantees of a part only of the powers of the crown.¹

(18.) A person holding an office which is incompatible with any office which becomes vacant, is ineligible for the latter, and votes given for him are thrown away. To make him eligible for the latter office, he must absolutely vacate the former. Thus councillors, and the partners in business of councillors, being declared by statute to be incapable of holding the office of town-clerk, no election of a councillor or partner of a councillor to that office is competent; and though he may have received the votes of a large majority of the council, the other candidate, who may only have received the votes of a small minority, will be held to be elected. In some cases the incapacity of magistrates and councillors to be elected to any office of profit under the corporation, is declared by statute to continue for some time after they have ceased to hold office; and when this is the case, the ineligibility of course endures during the prescribed period.²

The question has been raised, but does not appear to have been decided, whether it is competent to elect a magistrate or office-bearer of a royal or parliamentary burgh to any other municipal office, *e.g.*, a bailie or treasurer to the office of provost. The same individual, it has been urged, cannot hold two distinct offices, and no municipal office can be resigned under the statute till after three weeks' written intimation of the intention to resign has been given to the town-clerk, or chief or senior magistrate. It is therefore contended that no office-bearer can be promoted or elected to another office until his resignation of the office which he holds has taken effect, *i.e.*, till three weeks after his resignation has been intimated. The object of the statute in requiring this

¹ *The King v. Kempe*, Trinity, 7 Will. III. (1695), Lord Raymond, (K.B.), 49.

² See section 23 of the Edinburgh Municipal Extension Act, 1856 (19 and 20 Vict., c. 32), quoted in footnote 3, p. 429.

intimation was obviously to secure that the business of the burgh should not be brought to a standstill by immediate resignations, and that sufficient time should be secured to the council to make such arrangements as may be considered necessary in view of such contingencies. It was intended, in other words, as it appears to the writer, to protect the burgh against hasty resignations, not to limit the council in the selection of the best men in the council at the time to fill the offices at its disposal. The election of A.—a bailie, treasurer, or other office-bearer—to a higher office does not deprive the burgh of his services, and in practice is made without requiring any formal resignation by him of his inferior office. His election to the higher office is held to vacate the lower, which is usually filled up immediately afterwards. If this course were not adopted considerable inconvenience might frequently result. If, for example, a vacancy were to occur in the provostship, which the council might desire to fill by electing A., one of the bailies, to the office, while it might desire to elect B., the treasurer, to the office of bailie, and C., another office-bearer, to the office of treasurer. To require A., B., and C. to resign successively with a view to such election would cause at least nine weeks' delay, and three separate meetings, while the resignation of the three at the same time, in anticipation of their election at one meeting, even if this were not objectionable for other reasons, would lead substantially to the same result as is obtained by the present practice. The same practice, which has never been found to be attended with disadvantage in Scotland, seems to be followed in England, where elections of one class of officers in a corporation are made out of another and inferior class.¹ There, too, the effect of the election of A. from a lower to a higher office, and his acceptance of the latter, is to vacate the former. His divestiture of the former office holds, even should the

¹ Grant on Corporations, pp. 210, 211.

election to the latter be for any reason voided. The person elected cannot return to the inferior office.¹

(19.) In practice the minutes of meetings are usually prepared by the clerk after the meetings are over, and signed by the chairman after the minute has been submitted to a subsequent meeting. Objections to minutes so prepared and signed on the ground that they could not be held as evidence *per se* of what took place at the meetings, have invariably been repelled.² Where a meeting was adjourned and the minute was not signed, but the minute of the adjourned meeting was duly signed, this was held to be sufficient, the meeting and adjourned meeting being regarded as one.³

(20.) The maxim, *omnia præsumuntur rite et solemniter acta esse*, applies to all meetings of town councils, commissioners, and other public bodies. Whilst, therefore, the minutes show that meetings were held, and that certain business was transacted, it will be presumed, in the absence of clear evidence to the contrary, that the meetings were duly summoned and properly conducted; that the business set forth in the minutes was regularly done, and that all such previous steps were taken as were necessary to warrant the subsequent procedure.⁴

269. An act of a town council, commissioners of police,

¹ The King v. Hughes, 1826, 5 Barnwell and Cresswell (K.B.), 1826.

² Miles v. Bough, 21st Nov. 1842, 3 Adolphus and Ellis (Q.B.), 845.
Southampton Dock Company v. Richards, 1840, 1 Manning and Grainger, C.B., 448.

West London Railway Company, 28th November 1843, 3 Adolphus and Ellis (Q.B.), 873.

London and Brighton Railway Company v. Fairclough, 20th, 22d, and 26th April 1841, 2 Manning and Grainger, C.B., 676.

Inglis v. The Great Northern Railway Company, 19th and 20th April and 17th May 1852, 1 Macqueen, H. of L. C., 112.

³ Inglis v. Great Northern Railway Company, *supra*.

⁴ Lawes Case, 10th and 17th March 1832, 1 De Gex, Macnaghten and Gordon (Chancery), 421.

Grady's Case, 14th and 18th February 1863, 32 L.I. (Chancery), 326, 1 De Gex, Jones and Smith, 488.

Stanhope's Case, 12th January 1865, L.R., 1 Chancery, 161.

Knight's Case, 15th and 18th January 1867, L.R., 2 Chancery, 321.

or other body of public trustees, which may be reducible on the ground that one or more of the parties by whom the act was passed were disqualified by interest, may be validated by subsequent confirmation at meetings from which the interested parties are absent, or at which, though present, they take no part in the confirmatory action by a majority of the whole body to whom no objection applies.¹

270. The maxim *in actibus officii et processus credendum est clerico* applies to all minutes of town councils, commissioners of police, and other public trustees. Stair thus states the law:—"All acts and deeds under the hands of the clerks of processes are probative writs, and the warrants thereof are presumed; yet so as if they be recently quarrelled, the warrants must be produced; and in the case of reduction, upon improbation of the writs produced as titles or probation, they must be reproduced, unless they be adminiculated, or the tenor be proved, albeit the reduction be *ex intervallo*. These public writs prove what was done by the judge, or what was said or alleged by parties, but do not prove that the things alleged were true, except in so far as the instructions thereof are expressed generally or particularly."² Erskine states the doctrine to the same effect.³ This credit does not attach to statements by a clerk which are not *actus officii*.⁴

¹ Of this there is an illustration in *Nicol v. The Magistrates of Aberdeen*, 20th December 1870, 9 Macph., 306; 43 Jur., 136. At a meeting of the town council of Aberdeen a motion was carried to purchase one-half *pro indiviso* of an estate adjacent to the town,—one of the members of council who was present, and whose presence was necessary to form a quorum, being interested in the other *pro indiviso* half of the estate. At a subsequent meeting of council, at which that member was not present, the resolution to purchase was confirmed. The court held that the confirmation at the latter meeting obviated any objection which might otherwise have been taken to the validity of the first resolution on the ground of interest.

² Stair, iv., 42, 10.

³ Erskine, iv., 2, 6.

⁴ *Stuart and Others v. The Magistrates of Edinburgh*, 25th June 1697, *Fount, Mor.*, 12,536. In this case an action was brought against the magistrates for repayment, under the Act 1695, c. 25, of certain fines which had been imposed on the pursuers for absenting themselves from church

But when the minute sets forth proceedings which it was the duty of the clerk to record, it will be accepted as legal evidence of what took place, and parole proof of the minute being erroneous will not be admitted, unless, possibly when the alleged error was pointed out at the time, and the objection insisted in.¹ It has accordingly been held that the records of a burgh afford the proper proof of what was done at the election of magistrates,² and as to whether certain persons were members of council.³ The appointment of an officer by the magistrates and council may also be proved by

and attending conventicles, and which fines, it appeared from the decreets produced, had been paid at the bar and applied to the town's use. The Lords, however, would "not sustain the clerk's assertion in the decret, that the fine was converted to the town's use, to be probative *per se*, that not being *actus officii* wherein clerks are to be credited, else they might bind great debts upon the incorporation."

¹ *Ogilvy v. The Magistrates of Edinburgh*, 6th February 1810, 15 F.C., 553. In this case a minute of the Incorporation of Wrights and Masons was objected to as inaccurate, and parole proof was tendered that the clerk had erroneously entered certain votes. The objection had been taken at the time, but had not been insisted in before the meeting broke up. In these circumstances the court held the minute to be legal and authentic evidence, and repelled the objections made thereto. In deciding the case the bench observed, with reference to the inquiry demanded into the state of the votes, "that there was on that subject evidence from minutes certified by a proper officer, which must be held to be *prima facie* good evidence in a court of law; that to impugn the evidence it was not said that the votes had not been called, or that the election had not been carried on according to usual form, nor was any charge brought of fraud or partiality on the part of the clerk; that if any error was suspected to have been committed, immediate redress should have been demanded before any one left the meeting; that no doubt a protest appeared to have been taken, but the answer by the clerk seemed to have been reckoned sufficient, and the demand for a scrutiny to have been no further insisted on; that this term scrutiny indeed, in usual practice, meant the inquiry into and ascertaining the right of the electors, and not the ascertaining the number of votes; that, what might have been the case if there had been a demand at the time, before the meeting separated, to correct any errors that were suspected to have been committed, and this demand had been refused, it was not necessary to determine. But that the plea of the complainer was nothing else than an attempt to set aside and redargue the minutes by parole evidence, for the examination of the voters was just the evidence of witnesses, an attempt which could not be sanctioned."

² *Gardner v. Reekie*, 4th February 1828, *Murray's Jury Court Cases*, 438.

³ *Black v. Campbell*, 7th May 1819, 5 Dow, 23.

minutes entered in the records of the burgh ;¹ a commission on stamped paper is not necessary.

Extracts from these records, to be admissible as evidence must be prepared under official care, and be authenticated by the proper officer. Accordingly, as it is not the province of a judge to authenticate extracts of his own decrees, an extract of a decree by a commissary judge, signed by him in the absence of the clerk of court, was held to be null,² and copies of proceedings before a magistrate, certified by him, were held to be inadmissible.⁴

Copies of writings in official custody, and even copies of documents as entered in public records, are in some cases admissible, but these copies must in all cases be certified by the proper officer.

So in an action as to the usage of a burgh in reference to the admission of freemen, a copy of the seal of cause entered in the books of a corporation was admitted as evidence.⁶

¹ *Hunter v. Hill*, 11th July 1833, 11 S., 989 ; *Aitken v. Brydone*, 28th March 1861, 23 D., 838.

² *M'Douall v. The Prior of Ardchattan*, 10th January 1623, Mor., 12,180.

³ *Carmichael and Melville*, 22d April 1825, P. Shaw's Just. Cases, 137.

⁴ *Hope v. The Magistrates of Selkirk*, 26th December 1827, 4 Murray's Jury Court Cases, 391.

ACTS OF PARLIAMENT.

ACTS OF PARLIAMENT.

APPENDIX No. I.

ANNO TERTIO AND QUARTO

GULIELMI IV. REGIS.

CAP. LXXVI.

AN ACT TO ALTER AND AMEND THE LAWS FOR THE
ELECTION OF THE MAGISTRATES AND COUNCILS OF THE
ROYAL BURGHS IN SCOTLAND.—[28th August 1833.]

WHEREAS the Right of electing the Common Councils and Magistrates of the Royal Burghs of SCOTLAND appears to have been originally in certain large Classes of the Inhabitants of such Burghs, by the Abrogation of which ancient and wholesome Usage much Loss, Inconvenience, and Discontent have been occasioned, and still exist ; for Redress and Prevention whereof it is expedient that an immediate Remedy be applied, and that the close System of Election now practised in these Burghs should be forthwith abolished, and their ancient free Constitutions substantially restored: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the

Electors of
Council
how to be
qualified.

2 & 3 W.
4. c. 65.

Period when this Act shall come into operation the Right of electing the Town Councils in all such Burghs respectively (*except in those contained in Schedule (F) to this Act annexed*¹) shall be in and belong to all such Persons, and to such only, (except as herein-after excepted,) as are or shall be qualified, as Owners or Occupants of Premises within the Royalty, whether original or extended,² of any such Burgh, to vote in the Election of a Member of Parliament for such Burgh by virtue of an Act passed in the Second and Third Year of the Reign of His Majesty King WILLIAM the Fourth, intituled AN ACT TO AMEND THE REPRESENTATION OF THE PEOPLE IN Scotland,³ and as are duly registered as such Voters in the Registers *by the said recited*

¹ Schedule F is repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

² See the Acts 20 & 21 Victoria, cap. 70, intituled, "An Act to provide for the extension of the boundaries of Burghs in Scotland," &c., and 24 & 25 Victoria, cap. 36, intituled, "An Act to amend the Boundaries of Burghs Extension (Scotland) Act."

³ Or by virtue of "The Representation of the People (Scotland) Act 1868," (31 and 32 Victoria, c. 46). See section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

The following sections of the Act 2 & 3 Will. IV., cap. 65, define the qualifications thereby prescribed:—

- "11. And be it enacted, That every person, not subject to any legal incapacity, shall be entitled to be registered as hereinafter directed, and to vote at elections for any of the Cities, Burghs, or Towns, or Districts of Cities, Burghs, or Towns, hereinbefore mentioned, who when the Sheriff proceeds to consider his claim for Registration, shall have been, for a period of not less than Twelve Calendar Months next previous to the last Day of AUGUST in the present or the last Day of JULY in any future year, in the Occupancy, either as Proprietor, Tenant, or Liferenter, of any House, Warehouse, Counting House, Shop, or other building within the limits of such City, Burgh, or Town, which, either separately or jointly with any other House, Warehouse, Counting House, Shop, or other Building within the same Limits, or with any Land owned and occupied by him, or occupied under the same Landlord and also situate within the same limits, shall be of the yearly value of Ten Pounds: Provided always, that the Claimant shall have paid, on or before the Twentieth day of AUGUST in the present, or the Twentieth day of JULY in any future year, all assessed Taxes which shall have become payable by him in respect of such Premises previously to the Sixth day of APRIL then preceding: Provided also, that no such person shall be entitled to be registered or to vote in the present or any future year unless he shall have resided for Six Calendar Months next previous to the last day of AUGUST in the present, or the last day of JULY in any future year within such City, Burgh, or Town, or within Seven Statute Miles of some part thereof: Provided also, that persons so resident shall be entitled to be registered and to vote if they are the true owners of such Premises as are hereinbefore mentioned, within such City,

*Act appointed to be kept,*⁴ and also in all such Persons who are possessed of the Qualification described in the said

Burgh, or Town, of the yearly value of Ten Pounds or upwards, although they should not occupy any Premises within its limits, or although the premises actually occupied by them should be of less yearly value than Ten Pounds; and that the husbands of such Owners shall be entitled to vote, either in the lifetime of their wives, or after their death, if then holding such property by the courtesy of SCOTLAND: Provided also, that no person shall be entitled to be registered or to vote for any City, Burgh, or Town, who shall have been in the Receipt of Parochial Relief within Twelve Calendar Months next previous to the last day of AUGUST in the year One thousand eight hundred and thirty-two, or next previous to the last day of JULY in any succeeding year."

- "12. And be it enacted, That the premises in respect of which any person shall be deemed entitled to be registered, and to vote in the election for any City, Burgh, or Town, or District, shall not be required to have been the same Premises for the whole Twelve Months of his Occupancy, but may be different premises (but always of the requisite value) occupied in succession by such Person; provided always, that such person shall have paid all the assessed Taxes legally exigible from him in respect of all such Premises; and that where such Premises shall be of the yearly value of Twenty Pounds or upwards, and shall be jointly occupied by more than One person, each of such joint Occupiers shall be entitled to be registered and to vote, provided his shares and interest in the same shall be of the yearly value of Ten pounds or upwards."

⁴ Now the registers in force at the time, made up in terms of the Registration Acts. See "The Municipal Elections Amendment (Scotland) Act 1868," section 3.

By the Burgh Voters' Act, 19 and 20 Victoria, c. 58, section 1, it is enacted, that the clauses and provisions of the Act 2 and 3 Will. IV., c. 65, "enacted for the purpose of forming registers of persons entitled to vote in the election of members to serve in Parliament for burghs in Scotland, shall be and the same are hereby repealed, except as to any register" made previous to the passing thereof (on 21st July 1856); and it is enacted that the said Act, i.e., the Burgh Voters' Act, shall be taken to be part of the Act 2 and 3 Will. IV., c. 65, as fully as if it were incorporated therewith. The act then prescribes the way and manner in which the registers of voters in every burgh which sends or contributes to send a member to Parliament shall be made up by the burgh assessors, revised and corrected by the Sheriff, and printed and authenticated by the town clerk. And it is enacted by section 32 that the register of voters in any burgh, as completed by the court of appeal in each year shall, for all the purposes of the Act 3 and 4 Will. IV., c. 76, and for all other purposes, come in place of the register of voters in such burgh, established by the Act 2 and 3 Will. IV., c. 65; and so much of the Act 3 and 4 Will. IV. c. 76, as enacts that the town clerk of each burgh shall, on or before 16th of September in each year, make up and complete the list or roll of persons entitled to vote in the election of the common council of the burgh, is repealed, and the said list or roll shall be made up and completed on or before the 31st day of October in all future years. The Burgh Voters' Act is amended by "The Representation of the People (Scotland) Act 1868."

recited Act,* in respect of the Property or Occupancy of any House or other Subject therein described of the Value thereby required, within the Royalty of any Royal Burgh

* And in the Act 31 and 32 Victoria, c. 48. See "The Municipal Elections Amendment (Scotland) Act 1868," section 3.

The following sections of the Act 31 and 32 Vict., cap. 48, define the qualifications thereby prescribed:—

"3. Every man shall, in and after the year One thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote at elections for a member or members to serve in Parliament for a Burgh, who, when the Sheriff proceeds to consider his Right to be inserted or retained in the Register of voters, is qualified as follows; that is to say,

"1. Is of full age and not subject to any legal incapacity; and

"2. Is, and has been for a period of not less than Twelve Calendar months next preceding the last day of JULY, an Inhabitant, Occupier as Owner or Tenant of any Dwelling House within the Burgh:

"Provided that no man shall under this section be entitled to be registered as a voter who, at any time during the said Period of Twelve Calendar Months shall have been exempted from payment of Poor Rates on the ground of inability to pay; or who shall have failed to pay, on or before the first day of August in the present, or the twentieth Day of JUNE in any subsequent Year, all Poor Rates (if any) that have become payable by him, in respect of said Dwelling House or as an Inhabitant of any Parish in said Burgh, up to the preceding fifteenth day of MAY; or who shall have been in the receipt of Parochial Relief within the Twelve Calendar Months next preceding the said last day of JULY: Provided also, that no man shall, under this section, be entitled to be registered as a voter by reason of his being a Joint Occupier of any Dwelling House."

"4. Every man shall, in and after the year One thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a Burgh, who is qualified as follows; that is to say,

"1. Is of full age and not subject to any legal incapacity; and

"2. As a lodger has occupied in the same burgh separately, and as sole Tenant for the Twelve months preceding the last day of JULY in any year, Lodgings of a clear yearly value, if let unfurnished, of Ten pounds or upwards; and

"3. Has resided in such Lodgings during the Twelve Months immediately preceding the last day of JULY, and has claimed to be registered as a voter at the next ensuing Registration of voters."

"13. Different Premises occupied in immediate succession by any Person as Owner or Tenant during the Twelve Calendar months next previous to the last day of JULY in any year, shall have the same effect in qualifying such person to vote for a Burgh or County respectively, as a continued occupancy of the same premises in the manner herein provided: And this provision shall apply to the successive occupancy of Premises in Counties of the annual value of Fifty pounds and upwards, as well as to Premises which for the first time under this Act afford the qualification for the Franchise."

not now entitled to send members to Parliament: *Provided always, that all such Electors who may be qualified as hereinbefore provided shall have resided for Six Calendar Months next previous to the last day of June in this and all future Years within the Royalty of such Burgh, or within Seven Statute Miles of some Part thereof: Provided also, that no Person shall be entitled to vote who has been in Receipt of parochial Relief, or who has been a Pensioner of any Corporation, within Twelve Months of any such annual Election, or for any Burgh for which he may have been Town Clerk at the Time of such Election, or at making up the list or Roll of Electors with a view to such Election.*⁶

¹ II. *And be it enacted, That every Person claiming to be entitled to Vote in the Election of the Council of any Royal Burgh not now entitled to send Members to Parliament shall, on or before the Twentieth Day of September in the present and the Twenty-first Day of July in any succeeding Year, give in his Claim, subscribed by himself or his Agent, to the Town Clerk of such Burgh, such Claim being in the Form, as nearly as may be, of the first part of Schedule (A.) to this Act annexed, together with any written Title or other Evidence he may choose to produce along with such Claim; and such Town Clerk, immediately on receiving such Claim, shall mark upon it the Date when it was delivered to him, by filling up, as nearly as may be, the Form of the Second Part of the said Schedule (A.) to this Act annexed, and within Four Days after the last Day for receiving such Claims, and after consulting with the Provost or Chief Magistrate of such Burgh, shall give or cause to be given Intimation of all such Claims by affixing on the Church Doors of the several Parishes within the Royalty of such Burgh, Fourteen Days at least before the Time when such Claims are intended to be taken into consideration, a written or printed List of all such Claimants, together with a Notice specifying the Place where and the Day and the Hour at which such Claims are to be considered; and the said Notice shall also bear that any objection to such*

Electors in
Burghs
having no
Parliamen-
tary Regis-
ters.

⁶ The qualification for the municipal franchise is now the same in all respects as the qualification for the parliamentary franchise. See "The Municipal Elections Amendment (Scotland) Act 1868," sections 3, 4, 5, and 6; and "The Municipal Elections Amendment (Scotland) Act 1870," section 6.

¹ Section 2 is superseded by "The Municipal Elections Amendment (Scotland) Act 1870," sections 6 and 7 of which provide for the preparation of municipal registers in royal burghs that do not return members to parliament.

Claims will be at the same time taken into consideration, provided such Objections shall be lodged with the Town Clerk and intimated to the Party objected to, by either delivering a Copy of the Objection to him personally, or leaving the same at his Dwelling House, or transmitting it to him by Post, Seven Days previous to the Day appointed for considering the same and deciding upon such Claims (all such Objections being signed by the Party objecting or his Agent, and being drawn up, as nearly as may be, in the Form of the Schedule (B.) to this Act annexed); and the Persons claiming and the Persons objecting to such Claim shall have Access to see such Claims and Objections in the Town Clerk's Office at all seasonable Hours, without Payment of any Fee for such Inspection, and to obtain extracts therefrom, paying for any copy or Extract of the same at the Rate of Sixpence for every Seventy-two Words: Provided always, that every such Chief Magistrate shall be obliged, within Four Days, after the said Twenty-first Day of July, to fix on and communicate to the Town Clerk a Day for taking such Claims and Objections into consideration, which Day shall not be less than Twenty or more than Twenty-five Days, after the said Twentieth Day of September in the present and the said Twenty-first Day of July, in all future years.

Assessors
to be ap-
pointed.

¹ *III. And be it enacted, That the Provost or Chief Magistrate, or, in case of his Absence or Disability, the Senior Magistrate capable of attending in each such Burgh, shall, if required by any Three or more Persons claiming or objecting as aforesaid, previous to the Day appointed for the Consideration of such Claims and Objections, make choice of and appoint a Person of the Profession of the Law to be an Assessor or Assistant to him in the Decision thereof, such Assessor being always an Advocate or a Writer to the Signet, or a Solicitor of Supreme Courts, or a Procurator in the Inferior Courts, of not less than Three Years standing respectively; and such Provost or Chief or Senior Magistrate and Assessor shall, at the Hour appointed, proceed to consider the Claims and Objections lodged, and shall hear the Parties or their Agents thereupon, and receive all competent Evidence which either Party may produce in support of his Claim or Objection respectively; but no written Pleadings shall be admitted, nor any Record kept*

¹ Section 3 is superseded by "The Municipal Elections Amendment (Scotland) Act 1870," sections 6 and 7 of which provide for the preparation of municipal registers in royal burghs which do not return members to parliament.

of the Proceedings, except that the Magistrate or Assessor shall make a Note of the Witnesses who may be examined, and authenticate by his Signature any document or written Evidence which may be produced; and no other Witnesses shall be examined, and no other Documents produced, in any Court of Review, than those so noted and authenticated; and, where satisfied that the Claim is good, the said Magistrate shall write the Word thereon "Admit," and sign his Name thereto, and, where satisfied that the Claim is bad, he shall write thereon the Word "Reject," and sign his Name thereto; and where the Claim shall be sustained, the Claimant's Name shall be enrolled or entered by the Town Clerk of such Burgh in the List or Roll of Electors to be kept for such Burgh in manner hereinafter directed.

¹IV. And be it enacted, That the respective Town Clerks of each Royal Burgh shall, on or before the Twentieth Day of October in the present and on or before the Sixteenth Day of September in all future Years, make up and complete a List or Roll of Persons entitled to vote in the Election of the Common Council of such Burgh in manner following; videlicet, the Town Clerk of each Burgh which, in virtue of the said recited Act, sends either severally, or in combination with any other Burgh or Burghs, a Member or Members to Parliament, shall make up and complete such List by transferring from the Parliamentary Register for such Burgh to such List or Roll the Names of all the Voters contained in such Register entitled to vote in the Election of a Member of Parliament as are so registered in respect of Properties situated within the Royalty, whether original or extended, of such Burgh, without requiring any Claim, or admitting any Objection against the Persons so registered; and the respective Town Clerks of such of the Royal Burghs as do not now send or contribute to send a Member to Parliament shall in like manner make up a complete List or Roll of all the Persons, qualified in manner aforesaid, who shall have been admitted as Electors by the Chief or Senior Magistrates of such Burghs respectively in manner hereinbefore directed.

¹ Section 4 is modified as regards royal burghs which send or contribute to send a member to Parliament, by "The Municipal Elections Amendment (Scotland) Act 1868," section 6 of which provides for municipal registers in such royal burghs being made up on or before 31st October in each year; and is superseded as regards burghs which do not send or contribute to send a member to Parliament, by "The Municipal Elections Amendment (Scotland) Act 1870," sections 6 and 7 of which provide for the preparation of municipal registers in such burghs.

Lists to be
completed
annually.

¹V. And be it enacted, That each Town Clerk shall, in every succeeding Year, keep his List or Roll of Electors in the Town Clerk's Office, or other place appointed for keeping the Records of such Burgh, accessible, without Fees, at all seasonable Hours, from the First to the Tenth Day of August; and within Five Days after the last of these Days any Person intending to object to the continuance of any Name on the said List or Roll in any Burgh not contained in the said recited Act shall be bound to give in his Objections to such Town Clerk, in the same way and manner, and to be disposed of by such Town Clerk and Provost or Chief or Senior Magistrate and Assessor in all respects, as Objections against original Claims are hereinbefore and after directed to be disposed of; and each Town Clerk in such Burghs shall, on or before the Tenth Day of September in each such Year, proceed to correct and complete such List or Roll of Electors by removing therefrom all the Names to which such Objections shall have been sustained, and also the Names of any Persons who may be known to have died since such List or Roll was last completed, and shall also insert in such List or Roll the Names of any Persons who shall respectively have been admitted as Electors by the Provost or Chief or Senior Magistrate of such Burghs respectively, in manner hereinbefore directed; and each Town Clerk in the Burghs contained in the said recited Act shall in like manner correct and complete his List of Electors, on or before the Sixteenth Day of September, by removing therefrom the Names of such as may have died, and adding the Names of those who may have been inserted in the Register appointed by the said recited Act since it was made up in the previous Year, in respect of Premises situate within the Royalty of any such Burgh; and all Persons interested shall be entitled to Extracts from the said Lists, paying the Town Clerk for every Extract at the Rate of Sixpence for every Seventy-two Words contained therein.

Extracts
may be ob-
tained.

Appeal to
the Court
of Review
under re-
cited Act.

²VI. And be it enacted, That if either Party shall be dis-

¹ See note to section 4.

² By "The Representation of the People (Scotland) Act 1868," section 22, all enactments then existing regarding appeals from the judgments of sheriffs in Registration Courts for counties and burghs were repealed, and in lieu thereof, a new Appeal Court was constituted for both.

By "The Municipal Elections Amendment (Scotland) Act 1868," section 15, the sheriff of the county was substituted for the court of review prescribed by this section.

See note to section 4.

satisfied with the Decision of the Provost or Chief Magistrate and Assessor, admitting or rejecting any Claimant for the Right of electing Councillors, in any Burgh not contained in the said recited Act, it shall be competent to such Party, within Two Days of the Date of the Decision, but not thereafter, to appeal to the Court of Review appointed by the said recited Act for deciding upon Appeals as to the Registration of Voters for Members of Parliament for the District within which such Burgh may be situate, the Appellant always giving Notice, within the Time above specified, to the Town Clerk of such Burgh and to the opposite Party, of such Appeal, the Notice to the said Party being either delivered personally, left at his Dwelling Place, or transmitted through the Post Office, and producing to the Court of Appeal Evidence of such Notice before such Appeal shall be heard; and it shall be competent for such Court of Appeal, if it shall affirm the Judgment appealed from, to find Expenses due by the Appellant, and to decern for the same; and upon Production of the Judgment of such Court, or an Extract thereof, to the Town Clerk, Keeper of the List or Roll of Electors of such Burgh, such Town Clerk shall forthwith, where necessary, alter and correct such List or Roll in accordance with the Judgment of such Court; and the Sheriffs acting in such Courts of Appeal shall always proceed to the Consideration of Appeals under this Act immediately after they have disposed of all the Appeals under the said recited Act, and shall be entitled to add the Periods of Time during which they may be exclusively occupied with the said Appeals under this Act to the Periods occupied with the said other Appeals, and to make the same Charges for the Time so occupied in their Accounts in Exchequer as is by the said recited Act provided as to the said other Appeals.

VII. And be it enacted, That the several Burghs contained in the Schedule marked (C.) to this Act annexed shall be divided into Wards or Districts, which, together with the Number of Councillors to be chosen by each such Ward or District, shall be fixed and ascertained by the Commissioners named and appointed by His Majesty to inquire into and report upon the Condition of the several Burghs and Towns of SCOTLAND by virtue of a Commission dated on the Fifteenth Day of JULY in the present year;¹

Certain Burghs to be divided into Wards and Districts by Commissioners.

¹ The sub-division of the burghs here referred to into wards or districts, and the number of councillors to be annually elected in each of such wards or districts, were duly reported by the commissioners to

and such Commissioners shall have regard to its being the Purport and Meaning of this Act that the Number of Wards shall be such that each Ward shall, at the first Election to be made under this Act, choose, as nearly as may be, the Number of Six Councillors, and at the subsequent annual Elections in each succeeding Year the Number of Two Councillors; and the said Commissioners shall, upon such Division being made and completed, report the same to His Majesty's Privy Council, who shall cause such Report to be published by Royal Proclamation in the Gazette; and the Number and Limits of such Districts, and the Number of Councillors to be elected by each such District, being so fixed, reported, and published, shall be held and taken to be a Part of this Act, in the same Manner and to the same Effect as if the same were particularly set forth and enacted herein.

Councils to
be chosen.

¹VIII. And be it enacted, That (with and under the Ex-

the Privy Council, and thereafter published by royal proclamation, dated 16th October 1833. See the *London Gazette*, 18th October 1833.

"The Municipal Elections Amendment (Scotland) Act 1868," section 16, provided that each burgh divided into wards at the time of its passing [31st July 1868] for the purpose of electing town councillors, should be re-divided into the same number of wards, arranged with the view of accommodating the enlarged constituency created by virtue of the Act 31 and 32 Vict., c. 48. Section 17 of the same act provides for all royal or parliamentary burghs, having by the census last taken a population of above 10,000 persons, being divided into wards. Under the powers conferred by the section last referred to, several burghs have been divided into wards. See also note 2 to section 1.

See section 8 of "The Municipal Elections Amendment (Scotland) Act 1870," as to municipal elections in burghs divided into wards under "The Municipal Elections Amendment (Scotland) Act 1868."

¹ By "The Municipal Elections Amendment (Scotland) Act 1868," section 9, it is enacted, that it "shall not be competent to elect any person to the office of town councillor in any royal or parliamentary burgh in Scotland, unless the name of such person shall have been intimated to the town clerk of such burgh," in manner therein provided.

The mode of taking the poll in all contested municipal elections is altered by "The Ballot Act 1872;" and vote by ballot is substituted for an open poll and voting by signed lists. By section 20, sub-section (7) of that act, it is enacted that "a municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this act (the Ballot Act) had not been passed." And sub-section (2) of section 22 of the same act provides that "all municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs, contained in Schedule (C.) to the Act of 3 and 4 Will. IV., c. 76, . . . are directed to be

ceptions hereinafter provided) upon the First TUESDAY of NOVEMBER next the Electors qualified and entered in the List or Roll made up as aforesaid shall, in each of the said Royal Burghs not contained in Schedule (F.)² to this Act annexed, choose from among such of their own Number as either reside within the Boundaries assigned to such Burgh by the said recited Act, or as may carry on Business or reside within the Royalty thereof, such a Number of Councillors as by the Set or Usage of each Burgh respectively at present constitutes the Common Council of such Burgh, or where such number admits of Variation, then the smallest Number which may by the existing Set and Usage constitute a full Council in any such Burgh,³ in manner following; that is to say, in all such Burghs as are contained in the said Schedule (C.), and divided into Wards or Districts as aforesaid, the qualified Electors of each District whose Names shall be in the said List or Roll of such Electors shall, at some Place or Places to be appointed for each such Ward or District, of which Intimation shall be made by Notice affixed on the Church Doors of the several Parishes of such Burgh Ten Days at least previous to such Election, proceed to elect, from and among the Persons contained in the List or Roll of the whole Electors for such Burgh, as many Councillors for such Burgh, being either resident or personally carrying on Business as herein-before provided, as shall, by the Report of the Commissioners aforesaid, and the Proclamation thereof aforesaid, have been fixed and ascertained as the Number of Councillors to be elected in each such Ward,⁴ by *open*⁵ Poll, to be taken in the Presence of the Provost or Chief or Senior Magistrate of such Burgh,⁶ or of

conducted by the Acts in force at the time of the passing of this act" (the Ballot Act, 18th July 1872) "as amended by this Act; and all such Acts shall apply to such elections accordingly."

² Schedule (F.) is repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

³ The Act 15 and 16 Vict., c. 32, sections 2 and 3, altered the number of the magistrates and councillors in certain of the royal burghs in Scotland. See the schedule appended to that Act.

⁴ See notes to section 7 and 16 of this Act.

⁵ Section 8 is repealed by schedule Fifth of "The Ballot Act 1872," in so far as it provides that the election shall be by "open poll."

⁶ The Act 15 and 16 Vict., c. 32, was passed to make provision for the case of the provost and all the magistrates of any burgh being included in the third part of the council going out of office in any one year,

a legal Substitute or Substitutes to be appointed by him to officiate and preside at the Polling Place or Polling Places in each such Ward or District, from among the Persons of the Law described and qualified as aforesaid in relation to the Assessor to be appointed by any Chief Magistrate, to judge of the Claims of Enrolment to be made as aforesaid;⁷ and the Town Clerks of such Burghs, or the Persons who may be appointed by the Provost or

whereby their powers cease before their successors are elected. By section 5 of that act it is enacted, that whenever such an event shall occur, the provost and magistrates shall nevertheless retain and continue to exercise all the powers and functions of their several offices until the election and coming into office of their successors, but they shall not, after the period of their so going out of office, be entitled to act or vote as councillors. In such a case, the provost, though included in the third of the council retiring, will act as a "returning officer," under the Ballot Act 1872, making all the requisite arrangements connected with the poll, and appointing such "presiding officers" (coming in place of the substitutes referred to in this section) and polling clerks as may be necessary. But a difficulty arises, it is believed in every burgh except Edinburgh, when the provost or chief magistrate is included in the third of the council going out, while other magistrates remain in office. That contingency is provided for by the "Edinburgh Municipality Extension Act 1856," section 16 of which enacts that the appointment of substitutes and polling clerks made by the Lord Provost or senior magistrate immediately before an annual election shall be valid, notwithstanding his going out of office after making such appointment. There is, however, no analagous provision in any of the general acts relating to municipal elections in Scotland. The difficulty is stated in the Memorial submitted to the Solicitor-General (Mr A. R. Clark), and Mr William Watson, Advocate, and their opinion thereon is—"That in all cases where it is practicable, these appointments had better be made on the day of the election, by the returning officer who enters upon office on that day. But in cases where that course is not practicable, we think that a joint appointment of presiding officers and clerks by the provost and senior bailie, confirmed by the latter upon his becoming acting chief magistrate, would be sufficient compliance with the Act." See Memorial and Opinion, Appendix XV.

⁷ See section 3. Difference of opinion having existed as to whether the provisions of this act, in regard to the qualifications of these "substitutes," apply to the "presiding officers" whom the returning officer is empowered by the Ballot Act to appoint, the Solicitor-General and Mr Watson were consulted, and expressed an opinion that "presiding officers or substitutes appointed to superintend the poll at stations under the Ballot Act must still possess the qualifications prescribed by this section. The provisions of the Ballot Act," they add, "do not appear to us to be intended to regulate the qualifications of such officers in the case of municipal elections; and it is worthy of note that, whilst various portions of section 8 are, by section 32 and schedule Fifth of the Ballot Act, expressly repealed, that part of the clause which relates to the qualifications of polling substitutes is left intact." See Memorial and Opinion, Appendix XV.

Chief Magistrate thereof to officiate as Poll Clerks in the several Wards thereof, which Persons such Provost or Chief Magistrate is hereby authorised to appoint, shall each have with him a certified Copy of that Part of the foresaid List or Roll which contains the Names of the Voters qualified in respect of Property situate in each such District, according to which the Votes shall be taken; *and it shall not be competent at such Poll to inquire into any other Facts but the Identity of the Party tendering a Vote and the Person mentioned in the List or Roll, his still holding the Qualification there mentioned, and his not having previously voted at the same Election; all which Facts it shall only be competent to prove by the Oath of the Party so tendering his Vote, if required by any other Voter on the List or Roll; and no other Oath shall be put at such Election except only an Oath against Bribery, which, if required by any Voter on the Roll, shall also be put by the Magistrate or Substitute at each Polling Place; which two Oaths shall be put in the form of Schedules (D.) and (E.) to this Act annexed;*⁸ and each Poll Clerk shall enter each Vote for each Person proposed in a Poll Book, and the Provost or Chief Magistrate or Substitute presiding at such Election, and the Clerk or Person taking the Poll, shall subscribe their Names to each Page of such Book before any Entry shall be made in the succeeding Page.⁹

IX. And be it enacted, That no Poll by this Act authorized shall be kept open for more than One Day, and that only between the Hours of Eight in the Morning and Four in the Afternoon,¹ it being competent to the Town Clerk² to appoint as many Polling Places in each Ward, and as many Booths or Divisions at each Polling Place, as may be necessary for completing the said Elections within the said Period.

Poll not to be open more than One Day.

⁸ This provision is repealed by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."

⁹ This section, from the words "and each poll clerk shall enter," is repealed by schedule Fifth of "The Ballot Act 1872."

¹ No voter is entitled to receive a ballot paper after four o'clock. But if he has received a ballot paper before that hour, and has not unduly delayed to mark and deposit it, he may mark and deposit it after four o'clock. See section 15 of "The Ballot Act 1872." See Memorial and Opinion, Appendix XV.

² The duty of providing polling places in municipal elections seems to be transferred to the provost or chief magistrate by "The Ballot Act 1872," section 8 and sub-section (3) of section 20. See Memorial and Opinion, Appendix XV.

Poll Books
to be
summed up
by Provost,
who shall
declare the
Result.

¹X. And be it enacted, That at all such Elections of Councillors for the Burghs contained in the said Schedule (C.)² *the Poll Books for the several Wards or Districts of the said Burghs shall, at the Close of the Poll, be sealed up by the Persons who shall have presided at the Elections of the several Wards and taken the Polls thereat, and shall be transmitted to the Provost or Chief or Senior Magistrate, who, on the next lawful Day after the Receipt of the same, between the Hours of Twelve and Two, and within the Town House or other public Building of such Burgh, shall openly break the Seals, and with the assistance of the Town Clerk, and such other Persons as he may think fit to employ, shall cast up the Votes given, and shall declare upon whom the Election has fallen by the Majority of Votes (making a Double Return in any Case where the Votes shall be equal), and shall forthwith give, or cause to be given, Notice in Writing to the several Persons elected of such their Election, and require them severally to appear in the Town Hall, or other public Room aforesaid, on the Second lawful Day after such Election, when they shall severally declare whether they accept or decline accepting the Office of Councillor; and if any such Person shall be found to have been elected by more than One of the said Wards or Districts, he shall thereupon declare for which Ward he intends to serve; and wherever this shall occur, or where there shall be a Double Return for any Ward, or where*

¹ Section 10 is repealed, "so far as it relates to Poll Books," by schedule Fifth of "The Ballot Act, 1872,"

² By sub-section (2) of section 22 of "The Ballot Act 1872," it is enacted that, except in so far as amended by that act, "all municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in Schedule (C.) to the act of 3 and 4 Will. IV., c. 76, are directed to be conducted by the acts in force at the time of the passing of this act" (the Ballot Act, 18th July 1872); "and all such acts," it is declared, "shall apply to such elections accordingly."

The Solicitor-General and Mr Watson were also consulted as to whether the provision of this section relative to the casting up, between the hours of twelve and two o'clock on the day after the election, of the votes given at the poll, is not repealed or superseded by the enactments of the Ballot Act, and they expressed the following opinion:— "We think that, at the close of the poll, the provost or other returning officer may proceed at once to examine the ballot papers and count the votes. The poll ought not, in our opinion, to be declared until between the hours of twelve and two on the day following the election. If the examination and casting up of the votes cannot be concluded before two o'clock, the poll ought to be declared as soon as possible after these operations are completed." See Memorial and Opinion, Appendix XV.

any Person elected shall decline accepting, then and in all such Cases the presiding Magistrate shall immediately appoint a new Election of a Councillor or Councillors in place of him or them so chosen elsewhere and so declining, at the Distance of not more than Four nor less than Two Days, and affix Notices of the Day so appointed on the Church Doors of the Burgh; and such Election shall be proceeded in in all respects in the same Manner in which the first Election in the said Wards or Districts, and the taking the Poll, casting up the Votes, and declaring the Result, is herein-before directed to proceed, until the Council of such Burgh shall be completed.

¹XI. And be it enacted, That upon the said first TUES- Election in
DAY of NOVEMBER next the qualified Electors of all the Burghs not
said Royal Burghs not contained in the said Schedule contained
(C.) or (F.)² shall *assemble in the Town Hall or other public* in Schedule
*Room of such Burgh, and*³ choose from among their own (C.) or (F.)
Number such and the like Number of Councillors, being
resident or personally carrying on Business, as herein-
before provided, as by the Set or Usage of such Burghs
respectively at present constitutes the Common Council of
such Burgh, or, where this is variable, the smallest number
constituting a full Council,⁴ and shall declare their Votes by
a List containing the Names of the Persons for whom each
Elector respectively intends to vote, which several Lists shall
be signed by each such Elector respectively, and shall be openly
given in by each Elector to the Town Clerk of such Burgh
on the Day of Election;⁵ and such Town Clerk, together with
the Provost or Chief or Senior attending Magistrate of the
Burgh, who shall preside at such Election, no other Inquiry
being permitted, or other Oath allowed to be tendered than as
hereinafter provided as to the Burghs in Schedule (C.)⁶ shall

¹ See note 1 to section 8.

² Schedule (F.) is repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

³ The words here printed in *italics* are repealed by schedule Fifth of "The Ballot Act 1872."

⁴ The Act 15 and 16 Victoria, c. 32, sections 2 and 3, altered the number of the magistrates and councillors in certain of the Royal Burghs in Scotland. See the schedule appended to that Act.

⁵ This section is repealed by schedule Fifth of "The Ballot Act 1872," "so far as it relates to voting by lists."

⁶ Superseded by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."

publicly cast up the Number of Votes, and shall declare upon whom the Election has fallen by the Majority of Votes;¹ and the Provost or Chief or Senior Magistrate shall forthwith give or cause to be given Notice in Writing to the several Councillors elected of such their Election, and call upon them severally to appear in the Town Hall or other public Room aforesaid on the Second lawful Day after such Election, when they shall severally declare whether they accept or decline accepting the Office of Councillor; and if any such Person so elected shall decline to accept, or in case there shall be an Equality of Votes in favour of Two or more Persons, the whole of whom cannot be received as Councillors, a new Election shall immediately thereafter take place for the vacant Place or Places of the Councillor or Councillors so declining to accept, or elected by equal Numbers, to be intimated as herein-before provided as to the Burghs in Schedule (C), and to proceed in the same Manner in all respects in which the Election for Councillors is hereinbefore directed to proceed, until the Council of such Burgh shall be completed.²

Elections
in Burghs
contained
in Schedule
(F.)

¹XII. And be it enacted, That nothing in this Act contained shall be held to affect or apply to the several Burghs contained in Schedule (F.) to this Act annexed; but the Election of Councillors and Magistrates in all the Burghs contained in the said Schedule (F.) shall proceed and be conducted in the Way and Manner hitherto practised in such Burghs, and as if this Act had not been passed.

Persons
elected
failing to
attend held
to decline
accepting.

XIII. And be it enacted, That in all the Cases of Election herein-before directed, if any Person elected as Councillor shall fail to attend on the Day appointed for declaring his Acceptance, he shall be held to have declined accepting the said Office, unless he then transmit to the Meeting a sufficient written Explanation, signed by himself or his Agent, of the Cause of his Absence, and intimating his Acceptance.

Council-
lors to be
Burgesses
before In-
duction.

²XIV. And be it enacted, That no person shall be

¹ Provided for by section 10, which now applies to all burghs. See note 1 to section 8.

² The part of this section, from the words "and the provost," is repealed by schedule Fifth of "The Ballot Act, 1872."

³ Section 12 is repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

⁴ Section 14 is repealed by the Act 23 and 24 Victoria, cap. 47, in so far as inconsistent with the said act.

entitled to be received and inducted as Councillor who shall not, previous to such Induction, be entered a Burgess of the Burgh for which he is so elected, wherever there is any Body of Burgesses in any such Burgh; and each such Person so elected shall produce, when he declares his Acceptance, the Evidence of his being such Burgess; and his Omission so to do shall be held to vacate his Election in the same Manner as if he had declined to accept: Provided always, that no merely honorary Burgess shall be entitled to be so inducted, and that any person so elected shall be forthwith entitled to be entered as a Burgess on payment of the ordinary Fees.

¹XV. And be it enacted, That upon the First TUESDAY of NOVEMBER One thousand eight hundred and thirty-four, and in every succeeding Year, the Electors in such Burghs shall in like manner, *videlicet*, the Burghs contained in the said Schedule (C.) in their several Wards or Districts, and the other Burghs at their General Meetings, assemble and elect, in manner herein-before prescribed in relation to the first Election under this Act, One Third Part, or as nearly as may be One Third Part, of the Council of such Burghs, in the place of the Third thereof who shall, as hereinafter directed, go annually out of Office, the Wards or Districts into which the Burghs contained in the said Schedule (C.) are divided then electing such Number of Councillors as by the said Royal Commission² such Wards or Districts shall be directed to elect at such annual Elections subsequent to the first Election.

Succeeding
annual
Election of
Council.

³XVI. And be it enacted, That upon the said First TUESDAY of NOVEMBER in the Year One thousand eight hundred and thirty-four, and in every succeeding Year, One Third, or a Number as near as may be to One Third, of the whole Council of each such Burgh shall go out of Office; and in the said Year One thousand eight hundred and thirty-four the Third who shall go out shall consist of the Councillors who had the smallest Number of Votes at the Election of Councillors in this present Year; and in the succeeding

One Third
Part of the
Council to
go out of
Office an-
nually.

¹ Section 15 is repealed by schedule Fifth of "The Ballot Act, 1872," so far as inconsistent with that act. See note 1 to section 8.

² See notes to section 7.

The Act 4 and 5 Will. IV., c. 87, was passed to remove all doubts as to the true meaning and legal effect of this provision, and all hazard of dispute and litigation thereon. The Act 4 and 5 Will. IV. c. 87, is repealed by schedule Fifth of "The Ballot Act, 1872."

Year, One thousand eight hundred and thirty-five, the Third of the Councillors first elected under this Act who shall go out shall consist of the Councillors who at such first Election under this Act had the next smallest Number of Votes, (the Majority of the Council always determining, where the Votes for any such Persons shall have been equal, who shall be the Persons to retire,) and thereafter the Third of the Councillors so annually going out of Office shall always consist of the Councillors who have been longest in Office :⁴ Provided always, that any Councillors so going out of Office shall be capable of being immediately re-elected.

Provost
and Magis-
trates to be
chosen.

¹ XVII. And be it enacted, That the Councillors of all such Burghs not contained in Schedule (F.)² to this Act annexed respectively so elected and accepting shall, upon the Third lawful Day after the Election of the whole Number of such Councillors in the Present Year, assemble in the Town Hall or other usual public Place of meeting within such Burgh, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost or Chief Magistrate, the Number of Bailies fixed by the Set or Usage of such Burgh, a Treasurer, and other usual and ordinary Office Bearers now existing in the Council by the Set or Usage of each such Burgh, and shall also elect the Managers of any charitable or other public Institution existing in or connected with such Burgh, the Appointment of the Managers to which is at present vested in the Magistrates and Town Council of such Burgh.

Existing
Councils
and Magis-
trates to go
out on
Comple-
tion of
next Elec-
tion.

³ XVIII. *And be it enacted, That (with and under the Exception hereinafter enacted) upon the Completion of the first Elections of Councillors, Magistrates, and Office-Bearers to be made in all the Royal Burghs in Scotland under the Pro-*

⁴ See section 5 of "The Municipal Elections Amendment (Scotland) Act 1870."

¹ See the Act 15 and 16 Vict., c. 32, by which, *inter alia*, provision is made for the case of the provost and magistrates of burghs being included in the one third of the council going out of office, whereby their powers cease before their successors are elected.

² Schedule (F.) is repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

³ Section 18 is repealed by schedule Fifth of "The Ballot Act 1872."

visions of this Act, and not sooner, the Provost, Magistrates, Office Bearers, and other Councillors now in Office in such Burghs respectively shall go out, and their whole Powers, Duties, and Functions shall cease and determine, except only where any of the said Persons shall have been again elected under the Provisions of this Act.

XIX. And be it enacted, That (except as hereinafter excepted) the Offices and Titles of Deacon, and of Con-
vener and Dean of Guild, and of Old Provost and Old Bailie, as official and constituent Members of any Town Council, shall, after the Completion of the first Elections under the Provisions of this Act, cease and determine, and no Distinction shall afterwards be kept up or recognized between Trades Baillies and Merchant Baillies, or Trades Councillors and Merchant Councillors, in any such Council: Provided always, that (except as hereinafter excepted) the Duties and Functions heretofore performed by the Dean of Guild in such council, or in any Dean of Guild Court of such Burgh, shall, in all the Burghs where there now is such an Officer, be performed by a Member of the Council to be elected, in manner hereinbefore provided, by the Majority of Councillors.

Official
Titles and
Functions
in Councils
to be
abolished.

XX. And be it enacted, That where any Trust, Manage-
ment, or Direction is by the Terms of any Public or Local Act, or of any Charter or Deed of Foundation, or other Deed, conferred on any Members of the Council under the Denomination of Old Provost, Old Bailie, or Old Dean of Guild, or of Merchant or Trades Baillies or Merchant or Trades Councillors respectively, the Town Councils to be named and elected in Terms of this Act shall, immediately after their own Acceptance and Induction into Office, nominate and elect from their own Body such a Number of Persons to be such Trustees, Managers, or Directors as are by such Acts, Charters, or Deeds appointed to those Offices under the said Denominations; and the whole Powers and Functions now belonging to the said Offices of Trustees, Managers, or Directors shall belong to and be as fully vested in the Persons so elected as if they had possessed the Denominations used in the said Acts, Charters, or Deeds.

Election of
Trustees
and Mana-
gers.

XXI. And be it enacted, That nothing herein contained shall be held or construed to impair the Right of any Craft, Trade, Convenery of Trades, or Guildry, or Merchants

Year. One thousand eight hundred and thirty-five. Third of the Councillors first elected under this Act shall go out shall consist of the Councillors who at first Election under this Act had the next smallest Number of Votes. (the Majority of the Council always determined where the Votes for any such Persons shall have been equal, who shall be the Persons to retire.) and there the Third of the Councillors so annually going out of Office shall always consist of the Councillors who have been longest in Office :¹ Provided always, that any Councillors so going out of Office shall be capable of being immediately re-elected.

Provost
and Magis-
trates to be
chosen.

¹ XVII. And be it enacted, That the Councillors of all such Burghs not contained in Schedule (F.)² to this Act annexed respectively so elected and accepting upon the Third lawful Day after the Election of the whole Number of such Councillors in the Present assembly in the Town Hall or other usual public Place meeting within such Burgh, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost or Chief Magistrate, a Number of Bailies fixed by the Set or Usage of such Burgh, a Treasurer, and other usual and ordinary Officers now existing in the Council by the Set or Usage of such Burgh, and shall also elect the Managers of any and all other public Institutions existing in or connected with such Burgh, the Appointment of the Managers of which is at present vested in the Magistrates of such Burgh.

Provost
and Magis-
trates to be
chosen.

XVIII. And be it enacted, That the Councillors of all such Burghs not contained in Schedule (F.)² to this Act annexed respectively so elected and accepting upon the Third lawful Day after the Election of the whole Number of such Councillors in the Present assembly in the Town Hall or other usual public Place meeting within such Burgh, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost or Chief Magistrate, a Number of Bailies fixed by the Set or Usage of such Burgh, a Treasurer, and other usual and ordinary Officers now existing in the Council by the Set or Usage of such Burgh, and shall also elect the Managers of any and all other public Institutions existing in or connected with such Burgh, the Appointment of the Managers of which is at present vested in the Magistrates of such Burgh.

visions of this Act, and not sooner, the Provost, Magistrates, Office Bearers, and other Councillors now in Office in such Burghs respectively shall go out, and their whole Powers, Duties, and Functions shall cease and determine, except only where any of the said Persons shall have been again elected under the Provisions of this Act.

XIX. And be it enacted, That (except as hereinafter Official Titles and Functions in Councils to be abolished. excepted) the Offices and Titles of Deacon, and of Con-
vener and Dean of Guild, and of Old Provost and Old Bailie, as official and constituent Members of any Town Council, shall, after the Completion of the first Elections under the Provisions of this Act, cease and determine, and no Distinction shall afterwards be kept up or recognized between Trades Baillies and Merchant Baillies, or Trades Councillors and Merchant Councillors, in any such Council: Provided always, that (except as hereinafter excepted) the Duties and Functions heretofore performed by the Dean of Guild in such council, or in any Dean of Guild Court of such Burgh, shall, in all the Burghs where there now is such an Officer, be performed by a Member of the Council to be elected, in manner hereinbefore provided, by the Majority of Councillors.

XX. And be it enacted, That where any Trust, Manage- Election of Trustees and Managers. ment, or Direction is by the Terms of any Public or Local Act, or of any Charter or Deed of Foundation, or other Deed, conferred on any Members of the Council under the Denomination of Old Provost, Old Bailie, or Old Dean of Guild, or of Merchant or Trades Baillies or Merchant or Trades Councillors respectively, the Town Councils to be named and elected in Terms of this Act shall, immediately after their own Acceptance and Induction into Office, nominate and elect from their own Body such a Number of Persons to be such Trustees, Managers, or Directors as are by such Acts, Charters, or Deeds appointed to those Offices under the said Denominations; and the whole Powers and Functions now belonging to the said Offices of Trustees, Managers, or Directors shall belong to and be as fully vested in the Persons so elected as if they had possessed the Denominations used in the said Acts, Charters, or Deeds.

XXI. And be it enacted, That nothing herein contained shall be held or construed to impair the Right of any Craft, Trade, Convenery of Trades, or Guildry, or Merchants

Rights of
Crafts,
Trades, and
Guildries
to elect
their own
Officers.

House or Trades House, or other such Corporation, severally to elect their own Deacons or Deacon Convener, or Dean of Guild or Directors, or other lawful Officers, for the Management of the Affairs of such Crafts, Trades, Conventions of Trades, or Guildries, Merchants or Trades Houses, or other such Corporations; but that, on the contrary, the said several Bodies shall, from and after the passing of this Act, be in all Cases entitled to the free Election in such Form as shall be regulated by them of the said several Office Bearers, and other necessary Officers for the Management of their Affairs, without any Interference or Controul whatsoever on the Part of the Town Council or any Member thereof.

Certain
Deans of
Guild and
Deacon
Conveners
to be Mem-
bers of
Councils ex
officio.

XXII. And be it enacted, That from and after the Time when this Act comes into operation the Persons elected (or to be elected) as hereinbefore provided to the Offices of Dean of Guild and Deacon Convener, or Convener of Trades, by the Conventory and Guild Brethren respectively in the City of EDINBURGH, and to the Offices of Dean of Guild and Deacon Convener by the Merchants House and Trades House respectively in the City of GLASGOW, shall, in virtue of their said Elections by the said Guild Brethren, Conventory, Merchants House, and Trades House respectively, be constituent Members of the Town Councils of the said Cities, and shall enjoy all the Powers and perform all the Functions now enjoyed or performed by such Office Bearers in these Cities; and in like Manner the Persons elected (or to be elected) to the Offices of Deans of Guild by the several Guildries of the City of ABERDEEN and the Towns of DUNDEE and PERTH shall, in virtue of such their Elections, be constituent Members of the Town Councils of the said City and Burghs respectively, and shall as such enjoy all the Powers and perform all the Functions now exercised or enjoyed by the existing Deans of Guild in the said City and Burghs respectively; and the registered Electors, qualified as hereinbefore provided, in the said Cities and Burghs of EDINBURGH, GLASGOW, ABERDEEN, DUNDEE, and PERTH shall, in NOVEMBER in the present Year and in all future Years, elect only such a Number of Councillors as, with the Addition of the said Deans of Guild and Conveners to be so elected as aforesaid, make up the Number of Councillors now existing in the said several Cities and Burghs; and the Councillors so elected in the said Cities

and Burghs of EDINBURGH, GLASGOW, ABERDEEN, DUNDEE, and PERTH shall not at the subsequent Election of Magistrates and Office Bearers elect any other Persons to fill the Offices or Perform the Functions of Deans of Guild or Conveners, but these Offices shall be held and exercised, in the said Councils and otherwise, by the Persons so elected as aforesaid in the said Cities and Burghs of EDINBURGH, GLASGOW, ABERDEEN, DUNDEE, and PERTH respectively, and by no other Persons.

XXIII. And be it enacted, That where any Trust, Management, or Direction of any charitable or other Institutions is vested in any Number of Deacons, or in a Deacon Convener, or Convener of Trades, or in any Dean of Guild, or other Office Bearers elected or hereafter to be elected by the several Crafts, Trades, Guildries, or Merchants, or Trades Houses, then and in all such Cases the Persons so elected as such Deacons, Conveners, Deans of Guild, or other Officers shall always be and continue Trustees and Managers of such Charities or Institutions, whether such Persons shall hereafter be Members of Council or not; and the Town Councils shall in no such Case have Power to elect from their own Body any other Trustees or Managers in place of such Deacons, Conveners, Deans of Guild, or other Officers: Provided always, that in any Burgh in which Trades Councillors or Merchant Councillors are or may be *ex officio* Trustees or Directors of any such Institutions or Charities, the Conventery or Trades House and the Guildry or Merchants House in such Burghs shall elect an equal Number from their own Bodies respectively to be such Trustees or Directors, anything herein contained to the contrary notwithstanding.

Trusts and
Managements to
be continued in
Persons
elected by
Crafts,
Trades, and
Guildries.

XXIV. And be it enacted, That when any Magistrate or Office Bearer (other than the Provost or Chief Magistrate and Treasurer) shall be in the Third of the Council going out of Office, the Place of such Magistrate or Office Bearer shall be supplied by Election by the Council as soon as the full Number thereof shall have been completed by the annual Election of the Third then hereby directed to take place, the said Election to be made by Plurality of Voices, and the Chief or Senior attending Magistrate to have a double or casting Voice in case of Equality: Provided always, that the Provost or Chief Magistrate and

Vacancies
of Magis-
trates
going out
of Office,
how sup-
plied.

the Treasurer shall always remain in Office for the Period of Three Years, and that they, as well as all the other Magistrates or Office Bearers, shall at all Times be capable of being re-elected.

Vacancies occurring within the Year, how to be supplied.

XXV. And be it enacted, That if any Vacancy shall in the Course of the Year occur in the Council or Magistracy or Office Bearers of any such Burgh by Death, Disability, or Resignation, the same shall be filled up *ad interim* by the remaining Members of the Council, by Election, as hereinbefore provided, at a Meeting to be called on Five Days' Notice by the Town Clerk by Intimation in Writing to each of such remaining Members of the Council;¹ but any Councillor, Magistrate, or Office Bearer so elected *ad interim* shall go out of Office on the First TUESDAY of NOVEMBER next ensuing his Election, and the Vacancy thereby occurring shall be supplied at the next annual Election of Councillors and Magistrates or Office Bearers in such Burgh; provided that if the Vacancy shall have occurred in any Burgh contained in the said Schedule (C.), such Vacancy shall at such annual Election be supplied by the Ward of such Burgh by which the Councillor who had died or resigned, or been disabled, had been elected, and which shall in this Case elect an additional Councillor, unless the Party so dying or disabled would then have gone out of Office as one of the Third hereby directed to retire.

Councillors, &c., may resign.

XXVI. And be it enacted, That any Person elected and accepting the Office of Councillor, Magistrate, or other Office Bearer in any Town Council, under the Provisions of this Act, may resign his said Office at any Time, upon giving not less than Three Weeks Notice of such his Intention by a written Intimation to the Town Clerk or Chief or Senior Magistrate; and in the Event of such Resignation being intimated as to be made at the Period of the annual Retirement of One Third of the Council, such additional Number of Councillors shall then be elected as may be necessary to complete the Council: Provided

¹ The Solicitor-General and Mr Watson having been consulted as to whether the provisions of "The Ballot Act 1872," apply to elections of councillors *ad interim*, expressed an opinion that these provisions have exclusive application to cases where the right of election belongs to the qualified electors of the burgh, and that *interim* elections by the council must continue to be conducted under the old law. See Memorial and Opinion, Appendix XV.

always, that no Fine or other Penalty shall be exigible from any Person either declining to accept after his Election or subsequently resigning his Office.

XXVII. And be it enacted, That where any Royal Burghs Burgh shall, in consequence of the Decision of a Court of Law or otherwise, be without any legal Council or Magistracy at the Time when this Act comes into operation, or at any future Time, all the Functions directed by this Act to be performed by the existing Magistrates or Councils shall be performed by One or more of the Managers who may, by any lawful Appointment, be then in the actual Administration of the Affairs of any such Burgh. having no legal Councils.

XXVIII. And be it further enacted, That no Councillor, nor the Partner in Business of any Councillor, shall be capable of holding the Office of Town Clerk in any such Burgh; and that no Town Clerk shall, during the Period he shall hold that Office, interfere directly or indirectly in the Election of the Magistrates or Town Council of any such Burgh. No Councillor to hold the Office of Town Clerk.

XXIX. And be it enacted, That all the Notices or Intimations hereby directed or required to be given or made in any such Burgh of any Meetings or Proceedings to be held or had in the Matter of the Elections of or respecting such Burgh shall, where not directed to be otherwise given, be given or made by the respective Town Clerks thereof.¹ Town Clerk to give Notices.

²XXX. And be it enacted, That the several Persons officiating at Elections as Substitutes for the Provosts or Chief Magistrates in the several Wards or Districts into which the Burghs contained in the said Schedule (C.) shall be divided (not being the Town Clerks of such Burghs), shall be entitled to receive a Sum not exceeding Three Pounds Three Shillings for each Day they shall respectively be so employed, the Poll Clerks officiating at such Elections being each entitled to the sum of One Pound One Shilling for each Day,² and the several Persons who shall be appointed to assist the Provost or Chief Magistrate of any of the Royal Burghs as Assessors in disposing of Claims Fees of Substitutes and Assessors, and Election expenses, how to be paid.

¹ See rule 46 of schedule First of "The Ballot Act 1872."

² See sub-section (5) of section 16 of "The Ballot Act 1872," as to the fees of presiding officers (who come in place of substitutes for the provost or chief magistrate) and clerks.

*and Objections as aforesaid (not being the Town Clerks of such Burghs) shall be paid a like Sum, not exceeding Three Pounds Three Shillings, each Day such Persons shall be so employed;*³ which Sum, together with all the other Expenses attending such Elections, or the making up of the Lists or Rolls of Electors, giving Notices at the Church Doors, and providing Copies of the said Rolls, or Parts thereof, for the Purposes of Election, shall be defrayed from the common Good or other Means or Revenues of such Burghs respectively.⁴

New Magistrates to administer the Affairs of the Burgh.

XXXI. And be it enacted, That the Magistrates and Council and Office Bearers to be elected under the Provisions of this Act shall in all respects stand in relation to the Administration of the Affairs and Property of such Burghs, or of Property under the Care and Management of such Burghs, in the same Situation in which the Magistrates and Council and Office Bearers of such Burghs did stand previous to the passing of this Act; and the Magistrates and Council and Office Bearers to be elected under the Provisions of this Act shall have such and the like Jurisdiction, and the same Rights and Powers of Administration of the Property and Affairs of the Burgh, and of making all usual and necessary Appointments, as heretofore lawfully belonged to and was exercised by their Predecessors in Office; any thing in the Set, Usage, or Custom of any such Burgh to the contrary notwithstanding.

Magistrates and Council to make up a state of their Affairs.

XXXII. And be it enacted, That the existing Magistrates and Council in all Royal Burghs shall, on or before the Fifteenth Day of OCTOBER in the present and in all future Years, make up a distinct State of their Affairs, subscribed by the Chief or Senior Magistrate, Town Clerk, and Treasurer, containing an Account of all the Funds, Properties, and Revenues in their Administration, and of all their Transactions in relation to such Funds, Properties, and Revenues since they came into Office; which Account shall be brought down as nearly as may be to the said Fifteenth Day of OCTOBER, and shall be kept in the Town Clerk's or Treasurer's Office, for the In-

³ The appointment of assessors is now superseded. See note to section 3.

⁴ Amended by "The Municipal Elections Amendment (Scotland) Act 1870," section 9, which enacts that the expenses of municipal elections in any burgh may be defrayed out of the assessments levied under the provisions and for the purposes of the registration acts.

spection of any of the registered Electors, from the said Fifteenth Day of OCTOBER down till the Time of the Election ; and a full and distinct Abstract of the said Account, with a Balance Sheet, containing all necessary Particulars, shall be printed and published by the said Magistrates on or before the Twentieth Day of the said Month of OCTOBER.¹

XXXIII. And be it enacted, That no Councillor or Magistrate elected and accepting under the Provisions of this Act shall incur by such Election or Acceptance any other Responsibility for the Debts of the Burgh, or the Acts of his Predecessors in Office, than might have attached to him as a Burgess or Inhabitant independently of such Election. Magistrates not responsible for the Debts of the Burgh.

XXXIV. And be it enacted, That if any Magistrate, Councillor, Town Clerk, Sheriff, or other Person shall wilfully contravene or disobey the Provisions of this Act, he shall be liable to be sued for such Offence in the Court of Session by any Person aggrieved for the penal Sum of Three hundred Pounds ; which Sum, or any smaller Sum which may be assessed by the Jury in any such Action, the Defender, upon Conviction, shall pay to the Pursuer with full Costs of Suit : Provided always, that every such Action shall be raised within Four Calendar Months after the Cause of Action shall have arisen, and that Notice in Writing shall be given to the Defender at least One Calendar Month before raising the same : Provided also, that any such Defender against whom Judgment shall have been once recovered in such Action shall be entitled to plead such Judgment as a Bar to any other Action which may be brought against him for the same Matter or Thing ; and such other Action being thereupon dismissed, such Defender shall recover his full Costs of Suit. Penalty for wilful Malversation.

XXXV. And be it enacted, That no Misnomer or inaccurate Description of any Person or Place in any Writing made in the Form of any Schedule to this Act annexed, or in any List or Register or Notice, or other Writing, made under Authority of this Act, shall in any way prevent or abridge the Operation of this Act ; provided that Misnomers not to vitiate proceedings.

¹ See the act 3 George IV., cap. 91, intituled, "An Act for regulating the mode of accounting for the common good and revenues of the Royal Burghs of Scotland" (29th July 1822).

such Person or Place shall be so designated in such Writing, List, Register, or Notice as to be commonly understood.

All Statutes at variance with this Act repealed.

Burgher Oath not to be taken.

Irregularity in the Election of Councillors only to affect themselves.

Act may be altered this Session.

XXXVI. *And be it enacted, That all Laws, Statutes, and Usages now in force respecting the Royal Burghs in that Part of Great Britain called SCOTLAND shall be and the same are hereby repealed in so far as they are inconsistent or at variance with the Provisions of this Act, but in all other respects the same shall remain in full Force and Effect:*¹ Provided always, that the Oath termed the Burgher Oath shall in no Case hereafter be required to be taken in any Burgh.²

XXXVII. *And be it enacted, That no Irregularity or Nullity in the Election of any Councillor or Magistrate shall in any Case after the passing of this Act annul or affect the Election of other Councillors or Magistrates not liable to the same Grounds of Objection, but those particular Elections only in which such Irregularity or Nullity shall have occurred.*³

XXXVIII. *And be it enacted, That this Act may be repealed, altered, or amended by any Act or Acts to be passed in the present Session of Parliament.*

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A.)⁴—Part First.

City [or Burgh] of

I, A. B., [insert Designation] hereby claim to be enrolled as a Voter for the Town Councillors of the said City [or Burgh] in respect of my Interest in the House, Shop, et cetera,

¹ Section 36, from the commencement to the words, "provided always, that" is repealed by schedule Fifth of "The Ballot Act, 1872."

² Under "The Municipal Elections Amendment (Scotland) Act 1868," section 8, a voter may only be required to make a declaration in the form of schedule (A.) annexed to that act.

³ Supplemented by the Act. 16 Vict., c. 26, so far as to provide for the election of councillors or magistrates in room of those whose election may have been null or irregular.

⁴ Section 38 is repealed by schedule Fifth of "The Ballot Act 1872"

⁵ This schedule is superseded by "The Municipal Elections Amendment (Scotland) Act 1870," section 6. See note to section 2 of this Act.

situated in [here insert the Situation of the Premises, described by the Street, Number, Parish, or other Locality]; *and* [in Cases where the Claimant chooses to make such production] *in support of my Claim I produce herewith a* [Disposition, Seisin, Lease, et cetera, dated, et cetera, as the Case may be.]

[Date.]

(Signed) A. B.

SCHEDULE (A.)¹—Part Second.

Number lodged with me C. D., Town Clerk of
this Day together with the Disposition, Seisin,
Lease, et cetera, above written [in Cases where any such
Documents are lodged.]

(Signed) C. D.

SCHEDULE (B.)²

City [or Burgh] of
I, A. B., [or We, C. D., E. F., et cetera,] object to the Claim
of A. B. to be admitted [or to continue on the Roll] as a Voter
for Councillors in the City [or Burgh] of on the
following Ground [here may be stated shortly the Grounds,
as that Property or Occupancy not of sufficient Value, that
the Party is not or has ceased to be Proprietor, Tenant, or
Occupant, or is personally disqualified, as being a Minor, a
fatuous Person, et cetera]; *and I crave to be heard on the*
said Objection or Objections before the Chief Magistrate or
Assessor.

[Date.]

(Signed) A. B.

SCHEDULE (C.)

EDINBURGH.
GLASGOW.
ABERDEEN.
DUNDEE.

PERTH.
DUNFERMLINE.
DUMFRIES.
INVERNESS.

¹ This schedule is superseded by "The Municipal Elections Amendment (Scotland) Act 1870," section 6. See note to section 2 of this Act.

² This schedule is superseded by "The Municipal Elections Amendment (Scotland) Act 1870," section 6. See note to section 2 of this Act.

SCHEDULE (D.)¹

I, A. B., do solemnly swear [or affirm], That I am the Individual described in the List or Roll for the City [or Burgh] of as A. B. of [here insert Description in the same Words as contained in the Roll]; that I am still the Proprietor [or Occupant] of the Property for which I am so enrolled, and hold the same for my own Benefit, and not in Trust for or at the Pleasure of any other Person; and that I have not already voted at this Election.

SCHEDULE (E.)²

I, A. B., do solemnly swear [or affirm], That I have not received or had, by myself or any person for my Use or Benefit, any Sum or Sums of Money, Office, Place, or Employment, Gift or Reward, or any Promise or Security for any Money, Office, or Gift, in order to give my Vote at this Election.

SCHEDULE (F.)³

**Dornoch.*
 **New Galloway.*
 **Culross.*
 **Lochmaben*
Bervie.

**Wester Anstruther.*
 **Kilrenny.*
 **Kinghorn.*
Kintore.

¹ Repealed by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868," and schedule (A.) of that act.

² Repealed by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868," and schedule (A.) of that act.

³ The Act 15 and 16 Vict., c. 32, altered the number of the magistrates and councillors in certain of the royal burghs in Scotland, and especially in the burghs specified in Schedule (F.) marked on this print with an asterisk.

Schedule (F.) is wholly repealed by section 3 of "The Municipal Elections Amendment (Scotland) Act 1868."

APPENDIX No. II.

ANNO TERTIO AND QUARTO

G U L I E L M I I V . R E G I S .

CAP. LXXVII.

AN ACT TO PROVIDE FOR THE APPOINTMENT AND ELECTION OF MAGISTRATES AND COUNCILLORS FOR THE SEVERAL BURGHS AND TOWNS OF SCOTLAND WHICH NOW RETURN OR CONTRIBUTE TO RETURN MEMBERS TO PARLIAMENT AND ARE NOT ROYAL BURGHS.—[28th August 1833.]

WHEREAS by an Act passed in the last Session of Parliament, intituled AN ACT TO AMEND THE REPRESENTATION OF THE PEOPLE IN Scotland, the Right of sending or contributing to send Members to Parliament was conferred on divers Burghs and Towns in SCOTLAND which were not Royal Burghs: And whereas there are in some of those Burghs and Towns no proper Magistracy or Councils; and the Constitution of such Magistracies and Councils, and the Mode of electing the same, where they do exist in such Burghs or Towns, is defective, and has given Occasion to much Inconvenience: For Remedy whereof it is expedient that Provision be now made for the due Appointment and Election of such Magistrates and Councils in all such Burghs; be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the First TUESDAY in NOVEMBER next there shall be in each of the several Burghs and Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK the Number of Sixteen Coun-

2 & 3 W.
4. c. 65.

Number of Councillors and Magistrates in each Burgh. cillors, whereof One shall be Provost, Four shall be Bailies, and one a Treasurer;¹ and in each of the several Burghs and Towns of FALKIRK, HAMILTON, PETERHEAD, MUSSELBURGH, and AIRDRIE there shall be the Number of Twelve Councillors, whereof One shall be Provost, and Three Bailies, and One a Treasurer;² and in each of the several Burghs or Towns of PORT-GLASGOW, CROMARTY, and PORTOBELLO there shall be the Number of Nine Councillors, whereof One shall be Provost, and Two Bailies;³ and in the Burgh of OBAN there shall be the Number of Six Councillors, whereof Two shall be Bailies.⁴

Councillors by whom to be elected.

II. And be it enacted, That the Right of electing the Councillors in each of the said Burghs and Towns shall be in all the Persons who are qualified to vote for a Member of Parliament for such Burgh or Town, whose Names shall be on the Register *directed to be kept by the said recited Act*,⁵ and which shall have been completed in Terms thereof up to the Period thereby directed next previous to the Time hereinafter appointed for the Election of such Councillors; and such Register so completed from Time to Time shall be and be deemed to be the Register of Electors of the Councillors for such Burghs or Towns respectively.

Certain Burghs to be divided into Wards and Districts by Commissioners.

III. And be it enacted, That the said Burghs or Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK shall be divided into Wards or Districts, which, together with the

¹ This arrangement still continues, except as regards the burgh of Kilmarnock, in which, by "The Kilmarnock Municipal Extension and Improvement Act 1871," (34 and 35 Vict. c. 71), the number of councillors is increased to twenty-five, whereof one is appointed to be provost, six to be bailies, and one to be treasurer.

The "Municipal Elections Amendment (Scotland) Act 1868," section 11, appointed each of the burghs of Hawick and Galashiels to have fifteen Councillors, whereof one must be provost, four must be bailies, and one must be treasurer; and otherwise classed these burghs with Paisley, Greenock, Leith, and Kilmarnock, subject to the provisions therein set forth.

² This arrangement still continues.

³ This arrangement still continues, except as regards the burgh of Port-Glasgow, to which an additional magistrate was assigned by "The Port-Glasgow Police Act 1865" (28 and 29 Vict. cap. 254).

⁴ This arrangement still continues.

⁵ Now the register in force at the time, made up in terms of the Registration Acts. See "The Municipal Elections Amendment (Scotland) Act 1868," section 5.

See note 4 to section 1 of the Act 3 and 4 Will IV., c. 76.

Number of Councillors to be chosen by each such Ward or District, shall be fixed and ascertained by the Commissioners named and appointed by His Majesty to inquire into and report upon the Condition of the several Burghs and Towns of SCOTLAND by a Commission dated on the Fifteenth Day of JULY in this present Year;¹ and such Commissioners shall have regard to its being the Purport and Meaning of this Act that the Number of Wards shall be such that each Ward shall, at the first Election to be made under this Act, choose, as nearly as may be, the Number of Three Councillors, and at the subsequent annual Elections in each succeeding Year the Number of One Councillor; and the said Commissioners shall, upon such Division being made and completed, report the same to His Majesty's Privy Council, who shall cause such Report to be published by Royal Proclamation in the Gazette; and the Number and Limits of such Districts, and the Number of Councillors to be elected by each such District, being so fixed, reported, and published, shall be held and taken to be a Part of this Act, in the same Manner and to the same Effect as if the same were particularly set forth and enacted herein.

²IV. And be it enacted, That upon the First TUESDAY of NOVEMBER next the Electors qualified and entered in the said Register shall, in each of the said Burghs or Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK,³ respectively choose from among such of their own Number as either reside within the Boundaries assigned to such Burgh or Town by the said recited Act, or as carry on Business personally therein, the Councils of the said respective Burghs or Towns in manner following; that is to say, the qualified Electors of each District whose Names shall be in the said Register shall at some Place or Places to be appointed for each such Ward or District, of which Intimation shall be made by Notice affixed on the Church Doors of the several Parishes of such Burgh Ten Days at least previous to such Election, proceed to elect from and among the Persons contained in the said Register such a Number of Councillors for such Burgh or Town, being either resident or personally carrying on

Councils to be chosen for Paisley, Greenock, Leith, and Kilmar-nock.

¹ See note to section 7 of the Act 3 and 4 Will. IV., c. 76.

² See note 1 to section 8 of the Act 3 and 4 Will. IV., c. 76.

³ See notes to section 1 of this Act.

Business within such Burgh or Town respectively, as hereinbefore provided, as shall by the Report of the Commissioners to be appointed as aforesaid, and the Proclamation thereof aforesaid, have been fixed and ascertained as the Number of Councillors to be elected in each such Ward,⁴ by *open Poll*,⁵ to be taken at the Polling Place or Polling Places appointed for each Ward, in the Presence of the Provost or Chief or Senior Magistrate capable of attending in such Burgh or Town,⁶ or of a legal Substitute to be appointed by him, such Assessor being of the Profession of the Law, and being always an Advocate, or a Writer to the Signet, or a Solicitor in the Supreme or Inferior Courts, of not less than Three Years standing respectively, to officiate and preside at the Election in each such Ward or District ;⁷ and the Town Clerks of such Burghs or Towns, or the Persons who may be appointed by the Chief Magistrate thereof to officiate as Poll Clerks in the several Wards thereof, which Persons such Provost or Chief Magistrate is hereby authorised to appoint, shall each have with him a certified Copy of that Part of the aforesaid Register which contains the Names of the Voters qualified in respect of Property situate in each such District, according to which the votes shall be taken; *and it shall not be competent at such Poll to inquire into any other Facts than the Identity of the Party tendering a Vote and the Person mentioned in such Register, his still holding the Qualification there mentioned, and his not having previously voted at the same Election, all which Facts it shall only be competent to prove by the Oath of the Party so tendering his Vote, if required by any other Voter on the Register ; and no other Oath shall be put at such Election, except only an Oath against Bribery, which if required by any Voter on the Roll shall also be put by the Magistrate or Substitute at each Polling Place ; which Two Oaths shall be put in the Form of Schedules (A.) and (B.) to this Act annexed ;⁸ and each Poll Clerk shall enter each Vote for each Person proposed in a Poll Book ; and the Provost or Chief Magistrate, or Substitute,*

⁴ See note to section 7 of the Act 3 and 4 Will. IV., c. 76.

⁵ This section is repealed by schedule Fifth of "The Ballot Act 1872," "so far as it provides that the election shall be by open poll."

⁶ See note 6 to section 8 of the Act 3 and 4 Will. IV., c. 76.

⁷ See note 7 to section 8 of the Act 3 and 4 Will. IV., c. 76.

⁸ This provision is repealed by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."

*presiding at such Election, and the Clerk or Person taking the Poll, shall subscribe their Names to each Page of such Book before any Entry shall be made in the succeeding Page.*⁹

V. Provided always, and be it enacted, That if in any Case in which the Provost or Chief or Senior attending Magistrate is directed to preside or act in any Burgh or Town under this Act, in manner hereinbefore or after provided, there shall be no such Provost or Chief or other Magistrate, the Sheriff of the County in which such Burgh or Town is situated, or one of his ordinary Substitutes, shall preside and act as such Provost or Chief or other Magistrate is hereby directed to preside and act as aforesaid.

In case there shall be no Chief or Senior Magistrate, the Sheriff of the County to preside at Election.

VI. And be it enacted, That no Poll by this Act authorized to be taken shall be kept open for more than One Day, and that only between the Hours of Eight in the Morning and Four in the Afternoon.¹

Poll not to be open more than One Day.

VII. And be it enacted, That it shall be lawful for the Provost or Chief or Senior Magistrate of any of the said Burghs or Towns to appoint such and as many additional Polling Places or Booth as may be necessary for ensuring the completing of such Election within One Day,² and also such additional Assessors (to be qualified and chosen as aforesaid) and also as many Poll Clerks as shall be necessary for that Purpose.

Provost or Chief Magistrate to appoint additional Polling Places, Assessors, &c., if necessary.

³VIII. And be it enacted, That at all such Elections of Councillors for the said Burghs or Towns, the Poll Books for the several Wards or Districts of the said Burghs or Towns shall at the Close of the Poll be sealed up by the Persons who shall have presided at the Elections of the several Wards and taken the Polls thereat, and shall be transmitted to the Provost

Poll Books to be summed up by Provost, who shall declare the Result.

⁹ This section, from the words "and each poll clerk shall enter," is repealed by schedule Fifth of "The Ballot Act 1872."

¹ See note 1 to section 9 of the Act 3 and 4 Will. IV., c. 76.

² Section 16 of the "Municipal Elections Amendment (Scotland) Act 1868," required the town clerk of Parliamentary as well as Royal Burghs, to provide such number of polling places or compartments as might be required for municipal elections. The duty of providing polling places seems to be transferred to the provost or chief magistrate by section 8 and sub-section (3) of section 20 of "The Ballot Act 1872." See Memorial and Opinion, Appendix XV.

³ This section is repealed by schedule Fifth of "The Ballot Act 1872." See note 1 to section 8 of the Act 3 and 4 Will. IV., c. 76.

or Chief or Senior Magistrate, who on the next lawful Day after the Receipt of the same, between the Hours of Twelve and Two, and within the Town House or other public Building of such Burgh, shall openly break the Seals, and with the Assistance of the Town Clerk and such other Persons as he may think fit to employ shall cast up the Votes given, and shall declare upon whom the Election has fallen by the Majority of Votes, (making a Double Return in any Case where the Votes shall be equal,) and shall forthwith give or cause to be given Notice in Writing to the several Persons elected of such their Election, and require them severally to appear in the Town Hall or other public Room aforesaid on the Second lawful Day after such Election, when they shall severally declare whether they accept or decline accepting the Office of Councillor; and if any such Person shall be found to have been elected by more than One of the said Wards or Districts, he shall thereupon declare for which Ward he intends to serve; and wherever this shall occur, or where there shall be a Double Return for any Ward, or where any Person elected shall decline accepting, then and in all such Cases the presiding Magistrate shall immediately appoint a New Election for the vacant Ward or District, or Wards or Districts, at the Distance of not more than Four nor less than Two Days, and affix Notices of the Day so appointed on the Church Doors of the Burgh or Town; and such Election shall be proceeded in in all respects in the same Manner in which the first Election in the said Wards or Districts, and the taking the Poll, casting up the Votes, and declaring the Result, is hereinbefore directed to proceed, until the Council of such Burgh shall be completed.

Councillors to be chosen for Falkirk, &c.

IX. And be it enacted, That upon the said First TUESDAY of NOVEMBER next the qualified Electors of all the said Burghs or Towns of FALKIRK, HAMILTON, MUSSELBURGH, AIRDRIE, PORT-GLASGOW, PETERHEAD, PORTOBELLO, CROMARTY, and OBAN respectively and severally shall assemble in the Town Hall or other public Place to be appointed and notified by the Town Clerk in each such Burgh or Town,¹ and choose from among their own Number the Number of Councillors hereinbefore directed to be chosen for each of such Burghs or Towns respectively, being resident or personally carrying on Business as hereinbefore provided.

¹ See note 1 to section 8 of the Act 3 and 4 Will. IV., c. 76.

² This section, from the words "assemble in the town hall" to the words "in each such burgh or town" is repealed by schedule Fifth of "The Ballot Act 1872."

and shall declare their Votes by a List containing the Names of the Persons for whom each Elector respectively intends to vote, which several Lists shall be signed by each such Elector respectively, and shall be openly given in by each Elector to the Town Clerk of such Burgh or Town on the Day of Election,³ no other inquiry being permitted at such Election, and no other Oath allowed to be administered than as hereinbefore provided as to the Burghs electing by Poll;⁴ and such Town Clerk, together with the Provost or Chief or Senior attending Magistrate of the Burgh or Town, who shall preside at such Election, shall publicly cast up the Number of Votes, and shall declare upon whom the Election has fallen by the Majority of Votes; and the Provost or Chief or Senior Magistrate shall forthwith give or cause to be given Notice in Writing to the several Councillors elected of such their Election, and call upon them severally to appear in the Town Hall or other public Room aforesaid on the Second lawful Day after such Election, when they shall severally declare whether they accept or decline accepting the Office of Councillor; and if any such Person so elected shall decline to accept, or in case there shall be an Equality of Votes in favour of Two or more Persons, the whole of whom cannot be received as Councillors, a new Election shall immediately thereafter take place for the vacant Place or Places of the Councillor or Councillors so declining to accept, or elected by equal Numbers, to be intimated as hereinbefore provided as to the Burghs electing by Poll, and to proceed in the same Manner in all respects in which the Election for Councillors is hereinbefore directed to proceed until the Council of such Burgh shall be completed.⁵

X. And be it enacted, That in all the Cases of Election hereinbefore directed, if any Person elected as Councillor shall fail to attend on the Day appointed for declaring his Acceptance, he shall be held to have declined accepting the said Office, unless he then transmit to the Meeting a sufficient written Explanation, signed by himself or his Agent, of the Cause of his Absence, and intimating his Acceptance.

Persons
elected
failing to
attend,
held to de-
cline ac-
cepting.

³ So much of this section as "relates to voting by lists," is repealed by schedule Fifth of "The Ballot Act 1872."

⁴ Repealed by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."

⁵ This section, from the words "and such town clerk" is repealed by schedule Fifth of "The Ballot Act 1872," being provided for by section 10 of the Act 3 & 4 Will. IV., c. 76, which now applies to all burghs. See note 1 to section 8 of the latter Act.

Succeeding
annual
Election of
Council.

¹XI. And be it enacted, That upon the First TUESDAY of NOVEMBER One thousand eight hundred and thirty-four, and upon the same Day in every succeeding Year, the Electors in such Burghs and Towns respectively² shall in like Manner, *videlicet*, the Burghs or Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK in their several Wards or Districts, and the said other Burghs or Towns at their General Meetings, assemble and elect, in manner hereinbefore prescribed in relation to the first Election under this Act, One Third Part or as nearly as may be One Third Part of the Council of each such Burgh or Town, in the Place of the Third thereof who shall, as hereinafter directed, go annually out of Office, the Wards or Districts into which the Burghs or Towns divided into Wards or Districts are divided then electing such Number of Councillors as by the said Royal Commissioners³ such Wards or Districts shall be directed to elect at such annual Elections subsequent to the first Election.

One Third
Part of the
Council to
go out of
Office an-
nually.

XII. And be it enacted, That upon the said first TUESDAY of NOVEMBER in the Year One Thousand eight hundred and thirty-four, and in every succeeding Year, One Third or a Number as near as may be to One Third of the whole Council of each such Burgh shall go out of Office; and in the said Year One thousand eight hundred and thirty-four the Third who shall go out shall consist of the Councillors who had the smallest Number of Votes at the Election of Councillors in this present Year; and in the succeeding Year, One thousand eight hundred and thirty-five, the Third of the Councillors first elected under this Act who shall go out shall consist of the Councillors who at such first Election under this Act had the next smallest Number of Votes, (the Majority of the Council always determining, where the Votes for any such Persons shall have been equal, who shall be the Persons to retire), and thereafter the Third of the Councillors so annually going out of Office shall always consist of the Councillors who have been longest in Office: Provided always, that any Coun-

¹ Section 11 is repealed by schedule Fifth of "The Ballot Act 1872," so far as inconsistent with that Act.

² As also Hawick and Galashiels. See section 11 of "The Municipal Elections Amendment (Scotland) Act 1868."

³ See note to section 7 of the Act 3 and 4 Will. IV., c. 76.

cillors so going out of Office shall be capable of being immediately re-elected.¹

XIII. And be it enacted, That the Councillors of the said Burghs or Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK² respectively so elected and accepting shall, upon the Third lawful Day after the Election of the whole Number of such Councillors in the present Year, assemble in the Town Hall or other usual public Place of meeting within such Burgh or Town, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost or Chief Magistrate, Four Bailies, and a Treasurer.

Election of
Provost
and Magis-
trates for
Paisley,
&c.

XIV. And be it enacted, That the Councillors of the said Burghs or Towns of FALKIRK, HAMILTON, PETERHEAD, MUSSELBURGH, and AIRDRIE respectively so elected and accepting shall, upon the Third lawful Day after the Election of the whole Number of such Councillors in the present Year, assemble in the Town Hall or other usual public Place of Meeting within such Burgh or Town, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost, Three Bailies, and a Treasurer.

Election of
Provost
and Magis-
trates for
Falkirk,
&c.

XV. And be it enacted, That the Councillors of the said Burghs or Towns of PORT-GLASGOW, CROMARTY, and PORTOBELLO respectively so elected and accepting shall, upon the Third lawful Day after the Election of the whole Number of such Councillors in the present Year, assemble in the Town Hall or other usual public Place of meeting within such Burgh or Town, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number a Provost and Two Bailies.

Election of
Provost
and Magis-
trates for
Port-Glas-
gow, &c.

¹ See section 5 of "The Municipal Elections Amendment (Scotland) Act 1870."

² Also Hawick and Galashiels. See section 11 of "The Municipal Elections Amendment (Scotland) Act 1868."

Election of
Bailies for
Obau.

XVI. And be it enacted, That the Councillors of the said Burgh of OBAN so elected and accepting shall, upon the Third lawful Day after the election of the whole Number of such Councillors in the present Year, assemble in the Town Hall or other usual public Place of meeting within such Burgh or Town, and shall there, by a Plurality of Voices (the Councillor who had the greatest Number of Votes at the Election of Councillors having a casting or double Vote in case of Equality), elect from among their own Number Two Bailies.

Election of
Managers
of Charities.

XVII. And be it enacted, That the Councillors of the said several Burghs or Towns shall in the like Manner as they are hereinbefore directed to elect their Magistrates, and at the same Time, elect the Managers of any charitable or other public Institution existing in or connected with such Burgh or Town, the Appointment of the Managers of which is at present vested in the Magistrates and Town Council of such Burgh or Town.

Existing
Councils
and Magistrates to go
out on
Completion
of next
Election.

¹XVIII. And be it enacted, That upon the Completion of the first Elections of Councillors, Magistrates, and Office Bearers to be made in all the said Burghs or Towns under the Provisions of this Act, and not sooner, the Provost, Magistrates, Office Bearers, and other Councillors now in Office in such Burghs or Towns respectively shall go out, and their whole Powers, Duties, and Functions shall cease and determine, except only where any of the said Persons shall have been again elected under the Provisions of this Act, and there shall thereafter be no other Magistrates or Officers for such Burghs or Towns than those hereby specified and directed to be elected and chosen,

Election of
Trustees
and Managers.

XIX. And be it enacted, That where any Trust or Management is, by the Terms of any Public or Local Act, or of any Charter or Deed of Foundation, or other Deed, conferred on the present Magistrate and Council of any of the said Burghs or Towns, the Magistrates and Councils, to be elected according to the Provisions of this Act shall have the same Powers and Rights as such Trustees, Managers, and Directors as belong to the existing Magistrates and Councils; and where any such Trust or Management is conferred on any particular Members of the present Council or Magistracy or Office Bearers of

¹ Section 18 is repealed by schedule Fifth of "The Ballot Act 1872."

any such Burgh or Town, the Town Councils to be named and Elected in Terms of this Act shall immediately after their own Acceptance and Induction into Office nominate and elect from their own Body such a Number of Persons to be such Trustees or Managers as are by such Acts, Charters, or Deeds appointed to those Offices under the said Denominations; and the whole Powers and Functions now belonging to the said Offices of Trustees or Managers shall belong to and be as fully vested in the Persons so elected as if they had possessed the Denominations used in the said Acts, Charters, or Deeds.

XX. And be it enacted, That in all Burghs where there are Burgesses no Person shall be entitled to be received and inducted as Councillor who shall not, previous to such Induction, be entered a Burgess of the Burgh for which he is so elected; and each such Person so elected shall produce, when he declares his Acceptance, the Evidence of his being such Burgess; and his Omission so to do shall be held to vacate his Election in the same manner as if he had declined to accept: Provided always, that no merely honorary Burgess shall be entitled to be so inducted, and that any Person so elected shall be entitled to be entered as a Burgess on Payment of the ordinary Fees to the Common Good of the Burgh.

Councillors to be Burgesses before Induction.

XXI. And be it enacted, That nothing herein contained shall be held or construed to impair the Right of any Craft, Trade, or Guildry severally to elect their own Deacons or Deacon Convener or Dean of Guild for the Management of the Affairs of such Crafts, Trades, or Guildries, but that on the contrary the said several Bodies shall, from and after the passing of this Act, be in all Cases entitled to the free Election of the said several Office Bearers and other necessary Officers for the Management of their Affairs, without any Interference or Controul whatsoever on the Part of the Town Council or any Member thereof.

Rights of Crafts, Trades, and Guildries to elect their own Officers.

XXII. And be it enacted, That when any Magistrate or Office Bearer (other than the Provost or Chief Magistrate and Treasurer) shall be in the Third of the Council going out of Office, the Place of such Magistrate or Office Bearer shall be supplied by Election by the Council as soon as the full Number thereof shall have been completed by the annual Election of the Third then hereby directed to take

Vacancies of Magistrates going out of Office how supplied.

place ; and the said Election shall be made by Plurality of Voices ; and the chief or senior attending Magistrate shall have a double or casting Voice in case of Equality : Provided always, that the Provost or Chief Magistrate and the Treasurer shall always remain in Office for the Period of Three Years, and that they as well as all the other Magistrates and Office Bearers shall at all times be capable of being re-elected.

Vacancies
occurring
within the
Year, how
to be sup-
plied.

XXIII. And be it enacted, That if any Vacancy shall in the Course of the Year occur in the Council or Magistracy or Office Bearers of any such Burgh or Town by Death, Disability, or Resignation, the same shall be filled up *ad interim* by the remaining Members of the Council by Election, as hereinbefore provided, at a Meeting to be called on Five Days Notice by the Town Clerk by Intimation in Writing to each of such remaining Members of the Council ;¹ but any Councillor, Magistrate, or Office Bearer so elected *ad interim* shall go out of Office on the First TUESDAY of NOVEMBER next ensuing his Election, and the Vacancy thereby occurring shall be supplied at the next annual Election of Councillors, and Magistrates or Office Bearers in such Burgh ; provided that if the Vacancy shall have occurred in any of the said Burghs or Towns of PAISLEY, GREENOCK, LEITH, or KILMARNOCK,² such Vacancy shall at such annual Election be supplied by the Ward of such Burgh or Town by which the Councillor who had died or resigned or been disabled had been elected, and which shall in this Case elect an additional Councillor, unless the Party so dying or disabled would then have gone out of Office as One of the Third hereby directed to retire.

Council-
lors, &c.,
may re-
sign.

XXIV. And be it enacted, That any Person elected and accepting the Office of Councillor, Magistrate, or other Office Bearer in any Town Council under the Provisions of this Act, may resign his said Office at any Time, upon giving not less than Three Weeks Notice of such his Intention by a written Intimation to the Town Clerk, or Chief or Senior Magistrate ; and in the Event of such Resignation being intimated as to be made at the Period of the annual Retirement of One Third of the Council, such

¹ See note to section 25 of the Act 4 and 5 Will. IV., c. 76.

² Also Hawick and Galashiels. See section 11 of "The Municipal Elections Amendment (Scotland) Act 1868."

additional Number of Councillors shall then be elected as may be necessary to complete the Council: Provided always, that no Fine or other Penalty shall be exigible from any Person either declining to accept after his Election or subsequently resigning his Office.

XXV. And be it enacted, That where any such Burgh or Town shall, in consequence of the Decision of a Court of Law or otherwise, be hereafter without any legal Council or Magistracy, all the Functions directed by this Act to be performed by the existing Magistrates or Councils shall be performed by One or more of the Managers who may by any lawful Appointment be then in the actual Administration of the Affairs of any such Burgh or Town, and in default of any such Managers by the Sheriff or Sheriff-Substitute of the County.

Burghs having no legal Councils.

XXVI. And be it enacted, That it shall be lawful for the Magistrates and Council of any such Burgh or Town to elect a Town Clerk for such Burgh or Town for the Period of One Year, without Prejudice to his Re-election, and also without Prejudice to the lawful Right of any existing Town Clerk in any such Burgh or Town to hold his Office of Town Clerk or Clerk to the Magistrates and Council *ad vitam aut culpam*.

Town Clerk to be appointed.

XXVII. And be it enacted, That all the Notices or Intimations hereby directed or required to be given or made in any such Burgh or Town of any Meetings or Proceedings to be held or had in the Matter of the Elections of or respecting such Burgh or Town shall, where not directed to be otherwise given, be given or made by the respective Town Clerks thereof; or in case there shall be no Town Clerk, the Duty imposed on the Town Clerk by this Act shall be performed by the Sheriff Clerk of the County:¹ Provided always, that no Councillor, nor the Partner in Business of any Councillor, shall be entitled to hold the Office of Town Clerk in any such Burgh or Town, and that no Town Clerk shall directly or indirectly interfere in the Election of Magistrates or Councillors for such Burgh or Town.

Town Clerk to give Notices.

XXVIII. And be it further enacted, That where there is no Parish Church within the Burgh, the Notices hereby required may be given at the principal Place of Public Worship within the Burgh.

Notices may be given at Place of Worship.

¹ See rule 46 of schedule First of "The Ballot Act 1872."

Fees of
Substi-
tutes and
Assessors,
and Elec-
tion Ex-
penses,
how to be
paid.

XXIX. And be it enacted, That the several Persons officiating at Elections as Substitutes for the Provosts or Chief Magistrates in the several Wards or Districts into which the Burghs or Towns of PAISLEY, GREENOCK, LEITH, and KILMARNOCK¹ shall be divided (not being the Town Clerks of such Burghs) shall be entitled to receive a Sum not exceeding Three Pounds and Three Shillings for each Day they shall respectively be so employed, and the Poll Clerks the Sum of One Pound and One Shilling each for the same Period; which Sum, together with all the other Expenses attending such Elections, or the making up of the aforesaid Register, giving Notices at the Church Doors, and providing Copies of the said Registers or Parts thereof for the Purposes of Election, shall be defrayed from the Common Good or other Means or Revenues of such Burghs respectively.²

Magis-
trates and
Town
Council to
have same
Powers as
Magis-
trates and
Council
now exist-
ing;

but not to
have the
Power of
trying for
Felonies,
&c.

XXX. And be it enacted, That the Magistrates and Town Council to be elected for the said Burghs or Towns under the Authority of this Act shall have such and the like Rights, Powers, Authorities, and Jurisdiction as is or are possessed by the Magistrates and Council of any Royal Burgh in SCOTLAND; and such Rights, Powers, Authorities, and Jurisdiction shall extend equally over all and every Part of the Limits of such Burghs or Towns as described in the said recited Act of the Second and Third Year of the Reign of His present Majesty: Provided always, that the Magistrates and Council of such Burghs or Towns shall not have the Power of trying for Crimes punishable by Death or Transportation; and that the Rights, Powers, Authorities, and Jurisdiction hereby conferred shall in no Case be exclusive of the Authority and Jurisdiction of any Admiralty Court or Dean of Guild Court now lawfully established, or of the Sheriff or Justices of the Peace of the County, over the Territory within the Boundaries of such Burghs or Towns respectively.

Magis-
trates, &c.,
to publish
a State of
their Af-
fairs yearly

XXXI. And be it enacted, That the existing Magistrates and Council in all the Burghs contained in this Act shall, on or before the Fifteenth Day of OCTOBER in the present and in all future years, make up a distinct State of their

¹ Hawick and Galashiels. See section 11 of the "Municipal Elections Amendment (Scotland) Act 1868."

² See notes to section 30 of the Act 3 and 4 Will. IV., c. 76.

Affairs, subscribed by the Chief or Senior Magistrate, Town Clerk, and Treasurer, containing an Account of all the Funds, Properties, and Revenues in their Administration, and of all their Transactions in relation to such Funds, Properties, and Revenues since they came into Office, which Account shall be brought down as nearly as may be to the said Fifteenth Day of OCTOBER, and shall be kept in the Town Clerk's or Treasurer's Office, for the Inspection of any of the registered Electors, from the said Fifteenth Day of OCTOBER down till the Time of the Election; and a full and distinct Abstract of the said Account, with a Balance Sheet containing all necessary Particulars, shall be printed and published by the said Magistrates on or before the Twentieth Day of the said Month of OCTOBER.

XXXII. And be it enacted, That if any Magistrate, Councillor, Town Clerk, Sheriff, or other Person shall wilfully contravene or disobey the Provisions of this Act, he shall be liable to be sued for such Offence in the Court of Session by any Person aggrieved for the penal Sum of Three hundred Pounds; which Sum, or any smaller Sum which may be assessed by the Jury in any such Action, the Defender, upon Conviction, shall pay to the Pursuer, with full Costs of Suit: Provided always, that every such Action shall be raised within Four Calendar Months after the Cause of Action shall have arisen, and that Notice in Writing shall be given to the Defender at least One Calendar Month before raising the same: Provided also, that any such Defender against whom Judgment shall have been once recovered in such Action shall be entitled to plead such Judgment as a Bar to any other Action which may be brought against him for the same Matter or Thing; and such other Action being thereupon dismissed, such Defender shall recover his full Costs of Suit.

XXXIII. And be it enacted, That no Irregularity or Nullity in the Election of any Councillor or Magistrate shall, in any Case after the passing of this Act, annul or affect the Election of other Councillors or Magistrates not liable to the same Grounds of Objection, but those particular Elections only in which such Irregularity or Nullity shall have occurred; saving always and reserving to all and every Person and Persons, or Class or Community of

Penalty for
wilful Mal-
versation.

Irregu-
larity in
the Elec-
tion of
Council-
lors only to
affect
them-
selves.

Act may be altered. **2 XXXIV.** *And be it enacted, That this Act may be repealed, altered, or amended by any Act or Acts to be passed in the present Session of Parliament.*

I, A. B., do solemnly swear [or affirm], That I am the Individual described in the List or Roll for the Town [or Burgh] of as A. B. of [here insert Description in the same Words as contained in the Roll]; that I am still the Proprietor [or Occupant] of the Property for which I am so enrolled, and hold the same for my own Benefit, and not in Trust for or at the Pleasure of any other Person; and that I have not already voted at this Election.

I, A. B., do solemnly swear [or affirm], That I have not received or had, by myself or any Person for my Use or Benefit, any Sum or Sums of Money, Office, Place, or Employment, Gift or Reward, or any Promise or Security for any Money, Office, or Gift, in order to give my Vote at this Election.

¹ Supplemented by the Act 16 Victoria, c. 26, so far as to provide for the election of councillors or magistrates in room of those whose election may have been null or irregular.

² Section 34 is repealed by schedule Fifth of "The Ballot Act 1872."

* Superseded by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."

*** Superseded by section 8 of "The Municipal Elections Amendment (Scotland) Act 1868."**

APPENDIX No. III.

ANNO DECIMO & UNDECIMO

VICTORIÆ REGINÆ.

CAP. XXXIX.

AN ACT TO AMEND AN ACT TO ENABLE BURGHS IN SCOTLAND TO ESTABLISH A GENERAL SYSTEM OF POLICE, AND ANOTHER ACT FOR PROVIDING FOR THE APPOINTMENT AND ELECTION OF MAGISTRATES AND COUNCILLORS FOR CERTAIN BURGHS AND TOWNS OF SCOTLAND.—
[21st June 1847.]

WHEREAS an Act was passed in the Session of Parliament holden in the Third and Fourth years of the Reign of His Majesty, King William the Fourth, intituled “AN ACT TO ENABLE BURGHS IN SCOTLAND TO ESTABLISH A GENERAL SYSTEM OF POLICE:” And whereas an Act was passed in the same Session of Parliament in the said Third and Fourth years of the Reign of His said Majesty, intituled “AN ACT TO PROVIDE FOR THE APPOINTMENT AND ELECTION OF MAGISTRATES AND COUNCILLORS FOR THE SEVERAL BURGHS AND TOWNS OF SCOTLAND WHICH NOW RETURN OR CONTRIBUTE TO RETURN MEMBERS TO PARLIAMENT, AND ARE NOT ROYAL BURGHS.” And where by the said second-recited Act no Provision is made for defraying the necessary Expenses of the Municipal Establishments thereby constituted, and the other expenses attending the Administration of the Affairs of the said Burghs and Towns, and some of the said Burghs and Towns do not possess

3 & 4 W. 4,
c. 46.

3 & 4 W. 4,
c. 77.

quence of the Decision of a Court of Law or otherwise, & without a legal Council at any future Time, and under the Administration of Managers, the qualified Electors of such Burgh shall, before the First TUESDAY of NOVEMBER next ensuing after the Date of the Appointment of such Managers, proceed to choose the Number of Councillors provided to such Burgh by this or the said first-recited Act and in all such cases the Sheriff of the County within which such Burgh is situated shall, on Application made to him by any qualified Elector of such Burgh, appoint One of the Managers thereof to discharge the Duties, and exercise the Powers directed in the said first recited Act and this Act to be performed and exercised by the retiring Provost or Senior Magistrate of such Burgh; and every such Election shall proceed and be carried on in all other respects in the Manner provided by the said first-recited Act, and this Act, until the Council of such Burgh shall be completed.¹

Election of
Magis-
trates, &c.
in Cases
where
Burgh has
been with-
out Council
and under
Managers.

VIII. Immediately after the Election of Councillors in any such Burgh shall be completed in manner herein before provided, the Councillors so elected shall proceed to elect from among their own Number the Magistrates of such Burgh, and shall also elect a Treasurer, and the other usual and ordinary Office Bearers fixed by the Set or Usage of such Burgh, and shall elect Managers of any charitable Institution which may be connected with such Burgh, and the Appointment of Managers to which is vested in the Magistrates and Council of such Burgh, also in the Manner provided in the said first-recited Act with regard to the Election of Magistrates and other Office Bearers, the Councillor who had the greatest number of Votes at the Election of Councillors presiding at such Election, and having a casting or double Vote in case of Equality; and in the event of Two or more Councillors having an equal number of Votes, One of the Managers of such Burgh to be appointed aforesaid shall preside, and shall have a casting but no deliberative Vote; and immediately on the Completion of such Election of Magistrates, the Managers of such Burgh shall cease to hold Office, and to administer the Affairs of the Burgh; and at succeeding annual Elections of Councillors and Magistrate

Succeeding
annual
Elections
of Council.

¹ See section 13 of "The Municipal Elections Amendment (Scotland) Act 1868," which contains a similar provision with reference to a burghs.

in any such Burgh shall take place at the Time and in the Manner provided in the said recited Acts and this Act.¹

IX. No Election of any Provost, or Magistrates, or Councillors, in any Burgh, which shall have taken place prior to the passing of this Act, shall be invalid by reason of any retiring Provost or Magistrate, or of any other Person not legally authorized, having presided at such Election, or having cast up the Votes and declared the Result of any Election of Councillors of such Burgh, anything in any Act of Parliament, or Law or Practice to the contrary in anywise notwithstanding: Provided always, that nothing herein contained shall affect any Action or Proceeding at Law instituted prior to the passing of this Act.

Election of Magistrates not to be invalid in consequence of retiring Magistrate or other unauthorized Person presiding at Election.

X. The Provisions of the said recited Acts with respect to the Mode of Election of Magistrates and Councils, the Term of Magistrates and Councils remaining in Office, the Supply of Vacancies, and all other the Provisions thereof, shall, excepting in so far as inconsistent with or varied by this Act, be and remain in Full Force and Effect, but the said Acts shall, in so far as the same or any Parts thereof are inconsistent with the Provisions of this Act, but no further, be and the same are hereby repealed.

Recited Acts to remain in force, except in so far as inconsistent with this Act.

¹ See section 14 of "The Municipal Elections Amendment (Scotland) Act 1868," which contains a similar provision with reference to all burghs.

SCHEDULE to which the foregoing Act refers.

	Number of Council.	Balices.	Provost.
Annan,	15	3	1
Anstruther, Easter,	9	2	1
Anstruther, Wester,	9	2	0
Arbroath,	18	3	1
Auchtermuchty,	12	2	1
Banff,	9	2	1
Burntisland,	12	2	1
Craik,	9	2	1
Cullen,	12	2	1
Culross,	9	2	1
Cupar,	18	2	1
Dornoch,	9	2	1
Dumbarton,	15	3	1
Dunbar,	12	3	1
Dysart,	9	2	1
Earlsferry,	9	2	0
Falkland,	12	2	1
Forfar,	15	3	1
Haddington,	18	3	1
Inverary,	12	2	1
Inverkeithing,	12	2	1
Irvine,	18	2	1
Jedburgh,	15	3	1
Kilrenny,	9	2	1
Kinghorn,	9	2	1
Kirkwall,	12	2	1
Lanark,	15	3	1
Lauder,	9	2	0
Linlithgow,	15	3	1
Lochnaben,	9	1	1
New Galloway,	9	2	1
North Berwick,	9	2	0
Peebles,	12	2	1
Pittenweem,	12	2	1
Queensferry,	9	2	1
Renfrew,	12	2	1
Rothsay,	18	3	1
Sanguhar,	9	2	1
Selkirk,	15	2	1
Whithorn,	9	2	1
Wick,	15	3	1

APPENDIX No. V.

ANNO DECIMO SEXTO

VICTORIÆ REGINÆ.

CAP. XXVI.

AN ACT TO PROVIDE FOR THE SUPPLYING OF VACANCIES
IN TOWN COUNCILS OF BURGHS IN SCOTLAND CON-
SEQUENT ON NULL OR IRREGULAR ELECTIONS.—[14th
June 1853.]

WHEREAS by an Act passed in the Third and Fourth Years
of the Reign of His late Majesty King WILLIAM the Fourth,
intituled AN ACT TO ALTER AND AMEND THE LAWS FOR THE ^{3 & 4 W.}
ELECTION OF THE MAGISTRATES AND COUNCILS OF THE ROYAL ^{4, c. 76.}
BURGHS IN Scotland, it is enacted, “that no Irregularity or
“ Nullity in the Election of any Councillor or Magistrate
“ shall in any Case after the passing of this Act annul or
“ affect the Election of other Councillors or Magistrates
“ not liable to the same grounds of Objection, but those
“ particular Elections only in which such Irregularity
“ or Nullity shall have occurred:”¹ And whereas a like
Enactment is contained in another Act of the same Years
of the Reign of His said Majesty King WILLIAM the Fourth,
intituled AN ACT TO PROVIDE FOR THE APPOINTMENT AND ^{3 & 4 W.}
ELECTION OF MAGISTRATES AND COUNCILLORS FOR THE ^{4, c. 77.}
SEVERAL BURGHS AND TOWNS OF SCOTLAND WHICH NOW
RETURN OR CONTRIBUTE TO RETURN MEMBERS TO PAR-
LIAMENT, AND ARE NOT ROYAL BURGHS:² And Whereas
the Evils intended to have been obviated by the
said recited Enactments have not been so obviated,
by reason of no Provision having been made in the
said Acts for the Election of Councillors or Magistrates in
room of those whose Election may have been null or

¹ See section 37 of the Act 3 and 4 Will. IV., c. 76.

² See section 33 of the Act 3 and 4 Will. IV., c. 77.

irregular, and it is expedient that this Defect should be supplied: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

On Elections of Councillors being found null. Warrant to be granted for new Election

I. In all Cases in which any Election of a Councillor or Councillors in any of the Royal Burghs, Burghs, or Towns comprehended in the said recited Acts, or either of them, shall have been legally reduced or found to have been null, the Court of Session in SCOTLAND in either of its Divisions shall, on the Application by Petition on the Part of any One or more of the registered Electors of such Royal Burgh, Burgh, or Town, grant Warrant for a new Election of a Councillor or Councillors in room of the Councillor or Councillors whose Election shall have been so reduced or found null, to take place on a Day to be fixed by the said Court, not sooner than Ten nor later than Fourteen Days from the Date of such Warrant, and such new Election shall thereupon proceed on the Day so fixed in the Manner provided by the said recited Acts respectively for the annual Election of Councillors in such Royal Burghs, Burghs, or Towns; and the Councillor or Councillors elected on such Day shall be, in regard to Tenure of Office and in all other respects, in the same Situation as if they had been elected at the annual Election at which the Councillor or Councillors whose Election shall have been reduced or found to have been null were elected.

Election thereupon to proceed as at annual Election of Councillors.

II. As soon as such Warrant shall have been granted the Principal Clerk of Session, being Clerk to the Petition on which it was granted, shall forthwith transmit a certified Copy thereof to the Town Clerk of such Royal Burgh, Burgh, or Town, and such Town Clerk shall immediately on receipt of such certified Copy give Intimation of the Election thereby appointed by Notices to be affixed to the Door of the Parish Church or Churches in such Royal Burgh, Burgh, or Town; and the acting Provost or senior Magistrate, or failing there being at the Time any Provost or Magistrate, One of the Councillors to be nominated by the Sheriff of the County or his Substitute, shall discharge the Duties and execute the Powers directed by the said recited Acts to be performed by the Provost or senior Magistrate at the annual election of Councillors.

III. The necessary Expenses incurred by any Elector or Electors in obtaining such Warrant for a new Election as aforesaid as the same shall be taxed by the said Court, shall be recoverable by such Elector or Electors from the Treasurer of such Royal Burgh, Burgh, or Town, and when paid shall be chargeable by the Treasurer on the Funds thereof.

Expenses of Application for Warrant to be a Charge on the Funds of the Burgh.

IV. In all Cases in which the Election of a Councillor to the Office of Provost or Magistrate, or the Election of any Councillor who may have been thereafter appointed Provost or a Magistrate, shall have been legally reduced or found null, the Town Council shall at its First Ordinary Meeting thereafter, the full Number of the Council being always complete, elect a Provost or Magistrate who shall be, in regard to Tenure of Office and in all other respects, in the same Situation as if he had been elected when the Provost or Magistrate whose Election has been reduced or found null or has fallen was elected.

On Election of Magistrate being found null, Council to elect a Magistrate.

V. It shall not be lawful nor competent to institute any Action by way of Reduction, Declarator, Suspension, or otherwise for reducing any Election of a Councillor, Provost, or Magistrate, or for having the same found null, or for interdicting any Party who may have been elected Councillor, Provost, or Magistrate from acting as such, nor to execute any Summons, nor intimate any Suspension concerning the same, after the Lapse of One Month from the Date of his Election, and all such Summonses and Suspensions executed or intimated respectively within such Month shall be deemed summary Processes, and shall have Precedence as such in the Rolls of the said Court of Session.

No Challenge of Election to be made after the Lapse of a Month.

VI. Be it enacted and declared, That the Acts and Proceedings of any such Town Council prior to the Date when the Election of any of the Councillors thereof shall have been legally set aside or found null shall be valid and effectual, notwithstanding the Nullity or Irregularity of the Election of any One or more of the Councillors, and that the Actings of any Provost or Magistrate whose Election may be set aside or found null prior to its being so set aside or found null shall not be liable to Challenge in respect thereof.

Actings of Council and Magistrates to be valid, notwithstanding Elections being set aside.

APPENDIX No. VI.

ANNO VICESIMO & VICESIMO PRIMO

VICTORIÆ REGINÆ.

CAP. LXX.

AN ACT TO PROVIDE FOR THE EXTENSION OF THE BOUNDARIES OF BURGHES IN SCOTLAND, AND TO REMOVE DOUBTS AS TO THE RIGHTS OF CERTAIN PERSONS HOLDING OFFICES TO BE REGISTERED AS VOTERS FOR MUNICIPAL PURPOSES.—[25th August 1857.]

WHEREAS it is expedient to provide Means where Property situated without the Boundaries of Burghs in SCOTLAND may, in Terms of the Votes of the Persons interested therein, be included within the same: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Ratepayers may present a Petition to the Sheriff for Extension of Boundary of Burgh.

I. Any Ratepayers, to the Number of Twelve or more in respect of Lands and Heritages situated beyond the existing Boundaries of any Royal or Parliamentary Burgh in SCOTLAND, may present a Petition to the Sheriff of the County in which such Burgh or Part of a Burgh is situated,¹ praying him to take the Steps provided by the Act for extending the Boundaries of the Burgh to the Extent to be specified in such Petition; and the Sheriff shall, within Three Weeks from the Date of the Prese

¹ See section 2 of the Act 24 and 25 Victoria, cap. 36.

tation thereof, define and specify, in a written Deliverance on the Petition, such Boundaries, which shall include an Area Two Thirds of which is wholly or partially built on or laid out for building, as in his Opinion would be suitable for the extended Boundaries of the Burgh, and the same shall be thereafter published by Advertisement in such Manner as the Sheriff shall direct; and it shall be lawful for the Proprietor of any unbuilt-on Land within the proposed extended Boundaries, or to the Police Committee of the County to be appointed in Terms of any Act passed during the present Session of Parliament, within One Month after the last Advertisement so appointed, to appeal by Note of Appeal to any One of the Lords Ordinary of the Court of Session, who shall have Power, in a summary Way, to dispose of such Appeal, after such Inquiry as to him shall seem fit; and the Judgment of such Lord Ordinary, dismissing such Appeal or sustaining the same in whole or in part, shall be final and conclusive.¹

II. On the Lapse of One Month from the last Advertisement as aforesaid without any Appeal having been taken, or in the event of an Appeal having been taken, so soon as the same shall have been disposed of, the Sheriff shall, except where the Lord Ordinary shall on such Appeal have found that no Part of the Lands and Heritages proposed to be included within the Boundaries of the Burgh should be included therein, by such Advertisement as he shall direct, call a Public Meeting, at such Time and Place as he shall appoint, of the Ratepayers in respect of Lands and Heritages situated beyond the existing Boundaries of the Burgh, and within the extended Boundaries thereof, as defined by the Sheriff or by the Lord Ordinary on Appeal, to consider the Proposal to extend the said Boundaries; and the Sheriff shall preside at the Meeting, and the Sheriff Clerk shall act as Clerk; and each Person attending such Meeting shall deliver in Writing to the Clerk, his Name, Designation, and Address, before voting at or taking part in such Meeting; and in case a Majority of the Persons present thereat shall resolve to proceed in extending the said

Sheriff to
call Meet-
ing of
Ratepayers
for the
Consider-
ation of the
proposed
Extension
of Bound-
aries.

¹ By the Act 24 and 25 Victoria, cap. 36, provision is made for forming into wards, or annexing to existing wards, the district comprehended within the extended boundaries of any burghs which have been divided into wards.

Boundaries, according to the Specification and Definition of the Sheriff or Lord Ordinary, they shall at such Meeting name a Committee of such Ratepayers, not being fewer than Three nor more than Nine in Number, to confer with the Council of the Burgh as to the proposed Extension of the Boundaries thereof.

In case
Town
Council
consent to
proposed
Extension,
the same
shall be re-
considered
by Meet-
ing of
Rate-
payers.

III. In case the Town Council or a Majority thereof shall, after such Conference, resolve that it is expedient to carry into effect the proposed Arrangements, they shall publish such Resolution, with any annexed Conditions, in One or more local Newspapers, not later than the last Day of SEPTEMBER in any one Year; and such Resolution shall be re-considered at any Meeting of the Council to be held not sooner than the Second Week in the Month of NOVEMBER next following, and if the same shall be confirmed by the Council, the Sheriff shall call a Second Meeting of such Ratepayers, of which such Intimation shall be given by public Advertisement as he shall direct, and at which Meeting the Sheriff shall preside; and no other Question shall be put to the Meeting but "approve" or "disapprove" of the proposed Extension, on the Terms resolved on by the Town Council; and in case the Majority of Votes shall be in favour of the proposed Extension, the Boundaries and Conditions so agreed upon shall be set out at Length in the Minute of the Meeting, and authenticated by the Subscription of the Sheriff; and the Boundaries therein expressed shall thereafter, under the Conditions therein expressed, be the Boundaries of the Burgh for all Municipal Purposes only, including the Right of voting for Town Councillors and all Matters connected with Police, and the District comprehended within such Boundaries shall cease to belong to or form Part of the County in which it is locally situated, and shall belong to and form Part of such Burgh as regards all local Purposes, Rights, and Obligations; provided always, that nothing in this Act contained shall affect in any way the Right of voting for a Representative in Parliament.

Consent of
Council
required
before Re-
solution
considered.

IV. Where such adjoining Lands and Heritages include any Burgh or Portion of a Burgh, the Consent of the Town Council of such Burgh shall be required to such Resolution before it shall be considered by such last-mentioned Meeting; and it shall be lawful for any Proprietor or Proprietors of Lands and Heritages within such adjoining District

valued on the Valuation Roll in force for the Year at Two Thirds of the whole Value of Lands and Heritages within such District, at any Time prior to the last Meeting above mentioned, to lodge a Minute with the Sheriff stating that he or they object to the proposed Extension, and on such Minute being lodged the Sheriff, on being satisfied that the Value of the Lands and Heritages of such Proprietor or Proprietors is of the above Amount, shall suspend the Proceedings until the Consent of such Proprietor or Proprietors to the proposed Extension be obtained, and if such Consent be not intimated within Three Months the Proceedings shall terminate.

Sheriff may on Objection of Proprietors, suspend Proceedings until their Consent be obtained.

V. In the event of such proposed Extension being rejected, it shall not be competent for the Sheriff to call another Meeting for the Purpose of considering any proposed Extension of the Boundaries of the Burgh until after the Expiration of Two Years from and after the Date of the said first-mentioned Meeting.

If Proposal be rejected by Ratepayers, no Extension to be proposed for Two Years.

VI. Any Three Ratepayers entitled to be present and to vote at any Meeting called under this Act may present to the Sheriff, within Ten Days after the Date of such Second Meeting, a Petition praying for a Scrutiny; and he shall thereupon, at the Expense of the Petitioners, direct a Scrutiny of the whole Votes to be taken in such Manner as he shall think fit, in order to ascertain whether the Majority of those entitled to vote and who have voted at the Meeting have approved or disapproved of the proposed Arrangement; and in the event of the Result of such Scrutiny being to prove to the Satisfaction of the Sheriff that the Majority of the Votes of those entitled to be present and vote was in Truth adverse to the Decision of the Meeting as authenticated by his Signature, the Sheriff shall reverse such Decision, and such Reversal being authenticated by the Subscription of the Sheriff shall have all the Effects which a Decision to that Effect would have had if declared at such Meeting: Provided always, that no such Reversal shall be competent after the Expiration of more than One Month from the Date of such Meeting.

Sheriff to direct a Scrutiny, if Ratepayers petition for one.

VII. Any Person who shall falsely represent himself to be entitled to be present and to vote at any Meeting to be called under this Act, knowing himself not to be so entitled, and shall unlawfully attend and vote at such Meeting, shall be liable in a Penalty not exceeding Twenty

Penalties for making false Representations as to voting.

Pounds, which may be summarily recovered before the Sheriff by any Person suing therefor, and which shall be disposed of as the Sheriff shall direct.

Persons incapacitated by Office not to be excluded from Register of Voters.

VIII. Whereas by an Act passed in the Nineteenth and Twentieth Years of Her Majesty, Chapter Fifty-eight, intituled AN ACT TO AMEND THE LAW FOR THE REGISTRATION OF PERSONS ENTITLED TO VOTE IN THE ELECTION OF MEMBERS TO SERVE IN PARLIAMENT FOR BURGHES IN SCOTLAND, it is provided that the Register of Voters in any Burgh, as completed by the Court of Appeal in each Year, shall for all the Purposes of the Act passed in the Third and Fourth Years of King WILLIAM the Fourth, Chapter Seventy-six, and for all other Purposes, come in place of the Register of Voters in such Burgh established by the Act passed in the Second and Third Years of King WILLIAM the Fourth, Chapter Sixty-five: And whereas Doubts have arisen whether Persons holding Offices which render them incapable to vote in the Election of a Member or Members of Parliament are entitled to be placed on the Register of Voters: Be it enacted, That nothing in the first-recited Act contained shall operate to exclude such Persons from the said Register: Provided always, that their being so placed on the said Register shall not enable them to do any Act from which they are by Law incapacitated.

Expenses of Meeting, how to be provided.

IX. The whole Expenses incurred in relation to the calling and holding of any Meeting or Scrutiny under this Act shall be borne and paid by the Persons signing the Petition to the Sheriff, and the Sheriff Clerk, before any such Meeting is called, may require the Petitioners to consign or find Security to his Satisfaction for such Sum as the Sheriff may think reasonable for that Purpose: Provided always, that in case the Boundaries of the Burgh shall be extended, the whole Expenses shall be ultimately defrayed from the Common Good or other Funds of the Burgh, or by means of an Assessment on the whole Ratepayers within the extended Boundaries, which the Council of the Burgh is hereby empowered and, if necessary, directed to impose and levy, along with and in like Manner as the Prison Rate within such Burgh; and in either Case such Expenses may be recovered, together with the Costs of Suit, by the Disburser thereof, by summary Process before the Sheriff, whose Decision shall be final.

X. The Word "Ratepayer" shall mean and include every Person whose Name shall for the Time being appear as Proprietor or Tenant and Occupant of Lands and Heritages to the Value of Four Pounds or upwards on the Valuation Books of any County or Burgh, made up in Terms of an Act passed in the Seventeenth and Eighteenth Years of Her Majesty Queen VICTORIA, intituled AN ACT 17 & 18 FOR THE VALUATION OF LANDS AND HERITAGES IN SCOTLAND ; Vict. c. 91. and the Word "Sheriff" shall include Sheriff-Substitute.

APPENDIX No. VII.

ANNO VICESIMO TERTIO & VICESIMO QUARTO

VICTORIÆ REGINÆ.

CAP. XLVII.

AN ACT TO AMEND THE LAW RELATIVE TO THE LEG
QUALIFICATIONS OF COUNCILLORS, AND THE ADM
SION OF BURGESSES IN ROYAL BURGHS IN SCOTLAN
—[23d July 1860.]

WHEREAS, by the Fourteenth Section of an Act pass
in the Third and Fourth Years of His late Majesty Ki
3 and 4 W. William the Fourth, intituled an "ACT TO ALTER A
4, c. 76. AMEND THE LAWS FOR THE ELECTION OF THE MAGISTRAT
AND COUNCILS OF THE ROYAL BURGHS IN SCOTLAND
it was enacted, that no Person should be entitl
to be received and inducted as Councillor who sh
not previous to such Induction be entered a Bu
gess for the Burgh of which he is so elected, wher
ever there is any Body of Burgesses in any su
Burgh, and that his Omission to produce Evidence of h
being such Burgess when he declares his Acceptance
Office shall be held to vacate his Election, in the san
Manner as if he had declined to accept: And whereas l
an Act passed in the Ninth Year of Her present Majest
9 and 10 intituled "AN ACT FOR THE ABOLITION OF THE EXCLUSIV
Vict., c. 17. PRIVILEGE OF TRADING IN BURGHS IN SCOTLAND," the exclu
sive Privileges and Rights possessed in certain Royal an
other Burghs in Scotland, by the Members of certai
Guilds, Crafts, or Incorporations, of carrying on or exerci
ing certain Trades or Handicrafts within their respectiv

Burghs, are abolished: And whereas it is expedient to repeal the said Clause of the first-recited Act, and to make Provision for the Admission of Persons to be Burgesses in manner and under the Conditions herein prescribed: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. That the said Fourteenth Section of the first-recited Act, in so far as inconsistent with this Act, shall be and the same is hereby repealed.

Sect. 14 of
8 and 4 W.
4, c. 76,
Repealed.

II. That it shall be lawful to the Magistrates and Council of any Royal Burgh, and they are hereby authorized and empowered, to admit any Person entitled to vote in the Election of any Member of Council for such Burgh to the Status of a Burgess thereof, and that by a Minute of the Council thereof, and on Payment of such Entry Money, not exceeding in any Case the Sum of One Pound, as the Council of the Burgh may from Time to Time fix, which Entry Money shall be accounted Part of the Common Good of the Burgh and be applied accordingly; and every Person entitled to vote in the Election of any Member of Council shall, on being elected a Member of the Council of any Burgh, thereupon be eligible to be inducted, if before Induction he shall be admitted in manner aforesaid to the Status of a Burgess of the Burgh, anything contained in the said Fourteenth Section of the first-recited Act notwithstanding: Provided always, that such Admission by minute of Council shall not *per se* be held to give or imply any Right or Title to or Interest in the Properties, Funds, or Revenues of any of the Guilds, Crafts, or Incorporations of the Burgh, or any Mortifications or Benefactions for behoof of the Burgesses of such Guilds, Crafts, or Incorporations or of their Families, or any Right of Management thereof, or any Membership in any of the said Guilds, Crafts, or Incorporations.

Electors of
Members
of Council
may be ad-
mitted as
Burgesses
on certain
conditions.

APPENDIX No. VIII.

ANNO VICESIMO QUARTO & VICESIMO QUINTO

VICTORIÆ REGINÆ.

CAP. XXXVI.

AN ACT TO AMEND THE BOUNDARIES OF BURGHS EXTENSION
(SCOTLAND) ACT.—[22d July 1861.]

20 & 21 **WHEREAS** by the Act Twentieth and Twenty-first Vi
Vict. c. 70. **TORIA**, Chapter Seventy, it is provided that the Boundari
of Royal and Parliamentary Burghs in SCOTLAND may be
extended for Municipal Purposes only, including the Right
of voting for Town Councillors, and all Matters connected
with Police, and it is expedient that Provision should be
made for the Division into Wards of the District compr
hended within the extended Boundaries of such Burgh
as have been or may be divided into Wards: Be it enacted
by the Queen's most Excellent Majesty, by and with the
Advice and Consent of the Lords Spiritual and Temporal
and Commons, in this present Parliament assembled, and
by the Authority of the same:

Extended District may be formed into Wards or annexed to existing Wards by the Sheriff on Application of the Town Council.

I. Where the recited Act has been or shall be adopted in any Royal or Parliamentary Burgh in SCOTLAND which has been or shall be divided into Wards, and the extended Boundaries of such Burgh have been or shall be fixed in manner therein provided, it shall be lawful for the Sheriff of the County in which such Burgh is situated, or any of his Substitutes, on the Application of the Town Council of such Burgh, to form the District comprehended within such extended Boundaries into a Ward or Wards, or to annex such District or any part thereof to any One or more of the existing Wards of such Burgh, and to fix and

arrange the Limits of such extended Wards, and the Number of Councillors to be elected for each existing and extended Ward of such Burgh, in such Manner as he shall think fit, and to take all such Proceedings for these Purposes as may be necessary or expedient.

II. On such Formation or Annexation of Wards being made and completed, a Notice signed by such Sheriff or Sheriff-Substitute specifying the Limits of the extended Wards, and the Number of Councillors to be elected for each existing and extended Ward of such Burgh, as fixed and arranged by him, shall be published once in the EDINBURGH GAZETTE, and once in each of Two successive Weeks in a Newspaper published in such Burgh, or, if no Newspaper be published therein, in a Newspaper published in the County in which such Burgh is situate; and thereafter the qualified Electors of all such Wards, whose Names shall be on the List or Roll of Electors of such Burgh in force for the Time being, shall be entitled to vote in the Election of Councillors for such Burgh, for as many qualified Persons to be Councillors in and for such Wards respectively as are specified in such Notice, in the Manner provided by the Acts Third and Fourth WILLIAM the Fourth, Chapters Seventy-six and Seventy-seven; and all Orders or Deliverances made or pronounced by such Sheriff or Sheriff-Substitute in the Execution of this Act shall be final, and not subject to Appeal, Review, or Reduction in any Court, or by any Process whatsoever.

Notice of Limits of Wards and Number of Councillors to be published.

III. In the event of the Boundaries of any Burgh being extended into another County than that in which such Burgh is situate, it shall be lawful for the Sheriff or Sheriff-Substitute of the County in which such Burgh is situate to act, in carrying into execution the Provisions of this Act with respect to the District comprehended within such extended Boundaries in another County, in the same Manner and to the same Effect as if such District had been situate in the County of which he is Sheriff or Sheriff-Substitute.

Sheriff may act when extended Boundaries are in another County.

IV. All Expenses incurred in or with respect to the Proceedings under this Act in any Burgh shall be paid by the Town Council of such Burgh.

Expenses to be paid by Town Council

APPENDIX No. IX.

ANNO TRICESIMO PRIMO & TRICESIMO SECUNDO

VICTORIÆ REGINÆ.

CAP. CVIII.

AN ACT TO AMEND THE LAWS FOR THE ELECTION OF THE
MAGISTRATES AND COUNCILS OF ROYAL AND PARLIA-
MENTARY BURGHS IN SCOTLAND.—[31st July 1868.]

WHEREAS it is expedient to amend the Laws for the
Election of the Magistrates and Councillors of Royal and
Parliamentary Burghs in SCOTLAND:

Be it enacted by the Queen's most Excellent Majesty,
by and with the Advice and Consent of the Lords Spiritual
and Temporal, and Commons, in this present Parliament
assembled, and by the Authority of the same, as follows:

Short
Title.

I. This Act may be cited for all Purposes as The
Municipal Elections Amendment (SCOTLAND) Act, 1868.

Interpre-
tation of
Terms.

II. The following Expressions in this Act shall have
the Meanings hereby assigned to them, unless there be
something in the Subject or Context repugnant to such
Construction; that is to say:

The Expression "Parliamentary Burgh" shall mean
any Burgh, not being a Royal Burgh, which returns
or contributes to return a Member to serve in
Parliament:

The Expression "the Registration Acts" shall mean
the Act of the Nineteenth and Twentieth VICTORIA,
Chapter Fifty-eight, and the Eighth Section of the

Act Twentieth and Twenty-first VICTORIA, Chapter Seventy, and any other Acts or Parts of Acts relating to the Registration of Persons entitled to vote at the Election of Members to serve in Parliament for Burghs in SCOTLAND.

III. In every Royal Burgh in SCOTLAND now returning or contributing to return a Member or Members to Parliament (including those contained in Schedule F. annexed to the Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six, which Schedule together with the Twelfth Section of the said Act are hereby repealed,) the Right of electing the Town Council shall be in and belong to all such Persons as are or shall be qualified in respect of any Premises within the Royalty, whether original or extended, of such Burgh, to vote in the Election of a Member or Members of Parliament for such Burgh by virtue of the Acts Second and Third WILLIAM the Fourth, Chapter Sixty-five, or Thirty-first and Thirty-second VICTORIA, Chapter Forty-eight, and as are duly registered as such Voters in the Registers then in force made up in terms of the Registration Acts; and also in all Persons who are possessed of the Qualifications described in the said Acts Second and Third WILLIAM the Fourth, Chapter Sixty-five, or Thirty-first and Thirty-second VICTORIA, Chapter Forty-eight, in respect of the Premises therein described within the Royalty of any such Royal Burgh where the Limits thereof at any Point or Points extend beyond the Parliamentary Boundaries of such Burgh, or within the Municipal Boundaries of any such Royal Burgh where the same have been extended under any General or Local Act beyond the Limits of the Royalty, original or extended, or the Parliamentary Boundaries of such Burgh: Provided always, that nothing herein contained shall be construed to confer the Right of voting for Town Councillors on any Persons in respect of Premises situated beyond the Municipal Boundaries of any Royal Burgh, as such Boundaries may be limited and defined by any Act of Parliament.

IV. In every Royal Burgh not now entitled to send or to contribute to send a Member or Members to Parliament the Right of electing the Town Council shall be in and belong to all Persons who are possessed of the Qualifications for the Burgh Franchise described in the Acts

Qualifica-
tion of
Electors of
Council in
Royal
Burghs re-
turning
Members
to Parlia-
ment.

Qualifica-
tion of
Electors of
Council in
Royal
Burghs

not return-
ing Mem-
bers to
Parlia-
ment.

Second and Third WILLIAM the Fourth, Chapter Sixty-five, or Thirty-first and Thirty-second VICTORIA, Chapter Forty-eight, in respect of the Premises therein described within the Royalty of any such Royal Burgh.

Qualifica-
tion of
Electors of
Council in
Parlia-
mentary
Burghs.

V. In every Parliamentary Burgh in SCOTLAND the Right of electing the Town Councils shall be in and belong to all the Persons qualified to vote for a Member of Parliament for such Burgh whose Names shall be on the Register completed in Terms of the Registration Acts then in force, and also in all Persons who are possessed of the Qualifications described in the said Acts Second and Third WILLIAM the Fourth, Chapter Sixty-five, or Thirty-first and Thirty-second VICTORIA, Chapter Forty-eight, in respect of the Premises therein described within the Municipal Boundaries of any such Burgh where the same have been extended under any General or Local Act beyond the Limits of the Parliamentary Boundaries of such Burgh; and such Register so completed from Time to Time shall be and shall be deemed to be the Register of Electors of Councillors for such Burgh.

Municipal
Registers
in Royal
Burghs to
be made
up before
15th Nov.
1868.

VI. The Town Clerk of every Royal Burgh in SCOTLAND, including as aforesaid, (but excepting the Royal Burghs not now entitled to send or to contribute to send a Member or Members to Parliament, in which the List or Roll of Voters shall be and shall continue to be made up according to the existing Law and Practice.) shall, immediately after the Completion of the Register of Voters for Members of Parliament made up in the Year One thousand eight hundred and sixty-eight in terms of the Registration Acts, make up and complete in Terms of the Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six, the List or Roll of Persons entitled to vote in the Election of the Town Council of such Burgh; and the said List or Roll shall be made up and completed on or before the Fifteenth Day of NOVEMBER in the said Year, and such List or Roll shall be the Register of Voters at the next ensuing Election of Town Councillors: Provided always, that in every subsequent Year such List or Roll of Persons shall be made up, as heretofore, on or before the Thirty-first day of OCTOBER in such year: Provided also, that where the Parliamentary and Municipal Boundaries of any Royal Burgh are the same, the Town Clerk shall make up such List or Roll of Persons for such Burgh by certifying at

the end of a Copy of the Parliamentary Register for such Burgh that such Register is, in Terms of this Act, the List or Roll of Persons entitled to vote at the next ensuing Election of the Town Council of such Burgh.

VII. The Election of Councillors which by the Acts Third and Fourth WILLIAM the Fourth, Chapter Seventy-six, and Third and Fourth WILLIAM the Fourth, Chapter Seventy-seven, is appointed to take place upon the First TUESDAY of NOVEMBER in each year, shall in the present Year (One thousand eight hundred and sixty-eight) take place on the First TUESDAY of DECEMBER; and such of the Councillors, Magistrates, and Office Bearers of every Burgh as but for the provisions of this Act would have gone out of Office upon the First TUESDAY of NOVEMBER in the present Year (One thousand eight hundred and sixty-eight) shall in virtue hereof continue to hold and exercise their respective Offices, and to perform the whole Duties and Functions appertaining thereto, till the First TUESDAY of DECEMBER following: Provided always, that whenever by any Law or Practice any Trustees, Commissioners, or other Persons are appointed, or have been in use to be elected, along with the Councillors in any Burgh, such Trustees, Commissioners, or other Persons shall in the present Year be elected along with the said Councillors on the First TUESDAY of DECEMBER instead of on the First TUESDAY of NOVEMBER: Provided also, that wherever the Town Council of any Royal or Parliamentary Burgh or the qualified Electors thereof, is or are bound by Law to elect, or has or have been in the Practice of electing, any Person or Persons to be Members of any Commission, Board, or Trust, or to fill any Office or discharge any Duties whatsoever, and such Elections are or have been in use to be appointed to take place at fixed Periods after the annual Municipal Election in the Month of NOVEMBER in such Burgh, such Elections shall in the present Year One thousand eight hundred and sixty-eight be made at corresponding fixed Periods after the Municipal Elections in DECEMBER next ensuing; and the several Trustees, Commissioners, or other Persons elected as aforesaid, and holding Office on the First MONDAY of NOVEMBER in the present Year (1868), shall continue to hold and exercise their respective Offices, and to perform the whole Duties and Functions thereof, till their Successors are elected in virtue hereof; and all

Postpone-
ment of
Municipal
Elections
for the
Year 1868.

those Acts and Notices which have hitherto been appointed to be done or to be given with reference to such Election at certain Periods relatively to the said First TUESDAY the Month of NOVEMBER shall during the present Year be done or given at corresponding Periods relatively to the First TUESDAY of DECEMBER in said Year.

Registers
to be con-
clusive.

VIII. At every future Election of a Town Council for any Royal or Parliamentary Burgh the Register Voters made up and completed as aforesaid shall be deemed and taken to be conclusive Evidence that the Persons therein named continue to have the Qualifications which are annexed to their Names respectively in the Register in force at such Election, and such Persons shall not be required to take any Oath or solemn Affirmation but they may be required to make a Declaration in the Form of the Schedule (A.) to this Act annexed.

Names of
Candidates
for Town
Council to
be inti-
mated to
Town
Clerk.

IX. It shall not be competent to elect any Person to the Office of Town Councillor in any Royal or Parliamentary Burgh in SCOTLAND, unless the Name of such Person shall have been intimated to the Town Clerk of such Burgh, in the Manner hereinafter provided, on or before Four of the Clock, Afternoon, on the THURSDAY immediately preceding the Day of Election; and the Town Clerk shall, on or before the FRIDAY immediately preceding such Election, cause Public Notice to be given, as herein after provided, of the Names of all Persons so intimated to him; and the Intimation to the Town Clerk shall be in the Form of Schedule (B.) hereunto annexed, or as near thereto as Circumstances admit; and the Notice by the Town Clerk shall be in the Form of Schedule (C.) hereunto annexed, or as near thereto as Circumstances admit; and such Notice shall be affixed to the Doors of the Town Hall or Council Chambers and of the Parish Churches in the Burgh, and, if the Town Clerk shall think expedient the said Notice may be advertised in One or more Newspapers published or circulating within the Burgh; and in the event of the Town Clerk not receiving Intimation, as hereinbefore directed, of the Names of Persons proposing for Election sufficient to supply the Vacancies in any Burgh or Ward (where the Burgh is divided into Wards) or in the event of such Vacancies not being supplied by reason of the requisite Number of Councillors not being elected, from any Cause whatsoever, in any Burgh or War

as aforesaid, then and in either of these Events the same Procedure shall be adopted as is appointed to be followed in the Case of a double Return, or of a Person elected declining to accept Office as a Councillor; provided that in such Cases the Intimation to the Town Clerk of the Name of the Persons proposed for Election shall be given on or before Four of the Clock, Afternoon, of the Second lawful Day immediately preceding that fixed for the Election, and the Town Clerk shall forthwith give Notice as is hereinbefore directed.¹

X. Nothing herein contained shall prejudice the Right of the Persons elected or to be elected to the Offices of Dean of Guild and Deacon Convener, or Convener of the Trades, by the Convenery and Guild Brethren respectively in the City of EDINBURGH, and to the Offices of Dean of Guild and Deacon Convener by the Merchants House and Trades House respectively of the City of GLASGOW, and the persons elected or to be elected to the Office of Dean of Guild by the several Guildries of the City of ABERDEEN and Towns of DUNDEE and PERTH, to be constituent Members of the Town Councils of the said Cities and Burghs respectively, as provided by the Statute Third and Fourth WILLIAM Fourth, Chapter Seventy-six, Section Twenty-two.

Saving
Rights of
Deans of
Guild and
Deacons
Convener.

XI. On and after the First TUESDAY in DECEMBER One thousand eight hundred and sixty-eight each of the Towns or Burghs of HAWICK and GALASHIELS shall have Fifteen Councillors, whereof One shall be Provost, Four shall be Bailies, and One a Treasurer; and the said Councillors, Provost, Bailies, and Treasurer shall be elected, and the Affairs of the said Burghs or Towns shall be administered, in every respect, except as herein provided, as if they had been classed with PAISLEY, GREENOCK, LEITH, and KILMARNOCK in the Act Third and Fourth

Town
Councils in
Hawick
and Gala-
shiels.

¹ See section 3 of "The Municipal Elections Amendment (Scotland) Act 1870."

The provisions of this section, and of section 3 of "The Municipal Elections Amendment (Scotland) Act 1870," do not appear to be superseded or affected by "The Ballot Act 1872." The form of nomination of candidates prescribed by this Act should therefore be adhered to in all municipal elections in Scotland; the nominations ought to be lodged with the town clerk, and intimation of the names of the candidates ought to be given by him. See Memorial and Opinion. Appendix No. XV.

WILLIAM the Fourth, Chapter Seventy-seven, and had been made expressly subject to the whole Provisions of the said Act, and the Acts amending the same, and of this Act, so far as such Provisions are applicable to the said Towns or Burghs of HAWICK and GALASHIELS: Provided always, that nothing herein contained shall affect the Right of the Magistrates and Council of the Burgh of HAWICK to elect the Town Clerk of said Burgh for a Term of Three Years; and provided also, that any person entitled to vote for Town Councillors in the said Burgh of HAWICK may be elected a Member of the Town Council of the Burgh.

**Election of
Provost
and Magis-
trates for
Dunferm-
line.**

XII. The Town Council of the Royal Burgh of DUNFERMLINE, instead of electing a Provost, Two Bailies, and a Treasurer as heretofore, shall, on and after the First TUESDAY of DECEMBER One Thousand eight hundred and sixty-eight, elect from among their own Number One to be Provost or Chief Magistrate, Four to be Bailies, and One to be Treasurer; and in all respects the Provost, Bailies, Treasurer, and Councillors elected under the Provisions of this Act, and the Office Bearers lawfully appointed by them, shall have the same Jurisdiction, Powers, Rights, and Privileges as their Predecessors have heretofore had and exercised in the Administration of the Affairs of the said Burgh.

**Election
in Burghs
having no
legal
Councils
and being
under the
Adminis-
tration of
Managers.**

XIII. Where any Burgh shall at the Time of the passing of this Act be without any legal Council, and be under the Administration of Managers lawfully appointed, the qualified Electors of such Burgh shall, on the First TUESDAY of DECEMBER next after the passing of this Act, proceed to choose the Number of Councillors provided to such Burgh by the Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six, or the Act Fifteenth and Sixteenth VICTORIA, Chapter Thirty-two; and where any such Burgh shall, in consequence of the Decision of a Court of Law or otherwise, be without a legal Council at any future Time, and under the Administration of Managers, the qualified Electors of such Burgh shall, on the First TUESDAY of NOVEMBER next ensuing after the Date of the Appointment of such Managers, proceed to choose the Number of Councillors provided to such Burgh by the said last-mentioned Acts; and in all such Cases the Sheriff of the County within which such Burgh is situated

shall, on Application made to him by any qualified Elector of such Burgh, appoint One of the Managers thereof to discharge the Duties and exercise the Powers directed in the said last-mentioned Acts to be performed by the retiring Provost or senior Magistrate of such Burgh; and every such Election shall proceed and be carried on in all other respects in the Manner provided by the said last-mentioned Acts and this Act until the Council of such Burgh shall be completed.¹

XIV. Immediately after the Election of Councillors in any such Burgh shall be completed in manner hereinbefore provided, the Councillors so elected shall proceed to elect from among their own Number a Provost or Chief or Senior Magistrate, and the other Magistrate or Magistrates of such Burgh, and shall also elect a Treasurer and the other usual and ordinary Office Bearers fixed by the Set or Usage of such Burgh, and shall elect Managers of any charitable Institution which may be connected with such Burgh, and the Appointment of Managers to which is vested in the Magistrates and Council of such Burgh, all in the Manner provided in the said Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six, with regard to the Election of Magistrates and other Office Bearers; and the Councillor who had the greatest Number of Votes at the Election of Councillors shall preside at such Election, and have a casting or double Vote in case of Equality; and in the event of Two or more Councillors having an equal Number of Votes, One of the Managers of such Burgh, to be appointed as aforesaid, shall preside, and shall have a casting but no deliberative Vote; and immediately on the Completion of such Election of Magistrates, the Managers of such Burgh shall cease to hold Office and to administer the Affairs of the Burgh; and all succeeding annual Elections of Councillors and Magistrates in any such Burgh shall take place at the Time and in the Manner provided in the said last-mentioned Acts and in this Act.²

XV. In lieu of the Court of Review provided by the Sixth Section of the Act Third and Fourth of WILLIAM the Fourth, Chapter Seventy-six, all Appeals against the Decision of the Provost or Chief Magistrate and Assessor in

Election of
Magis-
trates, &c.
in cases
where
Burgh
have been
without
Council
and under
Managers.

Amend-
ment of
Sect. 6 of
3 & 4 W.
4, c. 76.

¹ See section 7 of the Act 15 and 16 Victoria, cap. 32.

² See section 8 of the Act 15 and 16 Victoria, cap. 32.

Royal Burghs not now entitled to send or to contribute to send a Member or Members to Parliament, referred to in said Section, shall be taken to the Sheriff of the County within which such Burghs are situated respectively; and the said Sheriff shall have all the Powers of such Court of Review, and his Decision shall be final, and not subject to Review.¹

Re-arrangement
of Wards.

XVI. As soon as conveniently may be after the passing of this Act each Burgh now divided into Wards for the Purpose of electing Town Councillors shall be re-divided into the same Number of Wards arranged with the view of accommodating the enlarged Constituency created by virtue of the Act of Thirty-first and Thirty-second VICTORIA, Chapter Forty-eight, and for this Purpose the Chief Magistrate of each burgh, the Sheriff of the County in which the Burgh is situated (excluding his Substitutes), and a Person to be appointed by One of Her Majesty's Principal Secretaries of State, or any Two of them, shall re-divide the Burgh into the same Number of Wards into which it is now divided, each Ward being numbered and having a distinctive Name or Number; and regard shall be had by them to the Number of Municipal Electors, and also to the Value of the Property in each Ward as appearing on the Valuation Roll; and the Parties aforesaid shall cause the proposed Division into Wards to be delineated upon a Plan which shall be open to the Inspection of all Persons concerned for the Space of Fourteen Days, and Notice shall be given previously to the first of the said Fourteen Days by Advertisement in One or more Newspapers published within the Burgh or the County in which the Burgh is situated where the said Plan is to be seen; and upon a Day after the Expiry of the said Fourteen Days to be specified in the said Advertisement the Parties aforesaid shall hear all concerned for their Interests, and thereupon the said proposed Division shall be finally adjusted by the Parties aforesaid, and they shall fix and determine the Order in which each of the re-arranged Wards shall be substituted for each of the existing Wards in returning Members to the Town Council in lieu of those who retire by Rotation; and the Parties aforesaid shall report the same to One of Her Majesty's Principal Secretaries of State, and on their Report being approved of by him the said Re-arrangement of Wards shall be published

¹ See note to section 6 of the Act 3 and 4 Will. IV., cap. 76.

once at least in the EDINBURGH GAZETTE, and in One of the Newspapers published within the Burgh or the County in which the Burgh is situated; and the said new Boundaries of Wards having been approved of and published as aforesaid shall take effect, and shall, after the Expiry of the present Year, be substituted for the existing Boundaries of Wards in making up the Rolls of Parliamentary and Municipal Electors for the Burgh: Provided always, that nothing herein contained shall limit the Powers of the Sheriff under the Act Fifth and Sixth WILLIAM the Fourth, Chapter Seventy-eight, Section Three:¹ Provided also, that if in any Burgh it shall appear to the Town Clerk that more than One Polling Place or Compartment is required for Municipal Elections in any of the Wards, he shall provide such additional Number as may be necessary, and publish the same in the Manner set forth in the Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six.²

XVII. It shall be lawful for the Town Council of any Royal or Parliamentary Burgh, having by the Census last taken a Population of above Ten thousand Persons, and not at the passing of this Act divided into Wards, to resolve, by a Majority of not less than Two Thirds of their Number, that the Burgh shall be divided into Wards for the Purpose of Parliamentary and Municipal Elections; and upon any such Resolution being adopted the Chief Magistrate of such Burgh, the Sheriff of the County in which the Burgh is situated (excluding his Substitutes), and a Person to be appointed by One of Her Majesty's Principal Secretaries of State, or any Two of them, shall divide the Burgh into Wards, each Ward being numbered, and having a distinctive Name or Number; and in fixing the Number of Wards, and in determining the Boundaries thereof, regard shall be had by them to the Number of Town Councillors in the Burgh and to the Number of Municipal Electors, and also to the Value of the Property as appearing on the Valuation Roll; and the Parties aforesaid shall cause the proposed Division into Wards to be delineated upon a Plan which shall be open to the Inspection of all Persons concerned for the Space of Fourteen Days, and Notice shall be given previous to the first of the

Burghs
not now
divided
may be
divided
into
Wards.

¹ See section 8 of "The Municipal Elections Amendment (Scotland) Act 1870."

² See note 2 to section 9 of the Act 3 and 4 Will. IV., cap. 76.

said Fourteen Days by Advertisement in One or more Newspapers published or circulating within the Burgh or the County in which the Burgh is situated where the said Plan is to be seen; and upon a Day after the Expiry of the said Fourteen Days to be specified in the said Advertisement the Parties aforesaid shall hear all concerned for their Interests, and thereupon the said proposed Division shall be finally adjusted by the Parties aforesaid, and they shall fix and determine the Wards to which the existing Town Councillors shall be apportioned, and the Order in which they shall retire by Rotation; and the Parties aforesaid shall report the same to One of Her Majesty's Principal Secretaries of State, and on their Report being approved of by him the said Division into Wards shall be published once at least in the *Edinburgh Gazette*, and in One of the Newspapers published or circulating within the Burgh or the County in which the Burgh is situated; and the said Boundaries of Wards having been approved of and published as aforesaid shall take effect, and shall, after the Expiry of the present Year, be the Boundaries of Wards in making up the Rolls of Parliamentary and Municipal Electors for the Burgh: Provided always, that nothing herein contained shall limit the Powers of the Sheriff under the Act Fifth and Sixth WILLIAM the Fourth, Chapter Seventy-eight, Section Three:¹ Provided also, that if in any Burgh it shall appear to the Town Clerk that more than One Polling Place or Compartment is required for Municipal Elections in any of the Wards, he shall provide such additional Number as may be necessary, and publish the same in the Manner set forth in the Act Third and Fourth WILLIAM the Fourth, Chapter Seventy-six.²

Repeal of
Act.

XVIII. All Laws, Statutes, and Usages shall be and the same are hereby repealed, in so far only as they may be in any way inconsistent with the Provisions of this Act, but in all other respects they shall remain in full Force and Effect, and this Act shall be read and construed along with the Tenor thereof.

¹ See section 8 of "The Municipal Elections Amendment (Scotland) Act 1870."

² See note 2 to section 9 of the Act 3 and 4 Will. IV., cap. 76.

SCHEDULES.

SCHEDULE (A.)

I *A.B.* declare that I am the Individual described in the Register now in force for the Burgh of
as *A.B.* [*here insert Description in the same Words as in the Register*], and that I have not already voted at this Election.

SCHEDULE (B.)¹

We *A.B.* [*here insert Name and Place of Abode as in the Municipal Register for the Burgh*], and *B.C.* [*here insert Name and Place of Abode as aforesaid*], hereby propose *C.D.* [*here insert Name and Place of Abode as in the Municipal Register for the Burgh*] for Election as a Councillor * at the next ensuing Municipal Election in the Burgh of [*specify Burgh*].

Given under our hand this [*insert Date*].

A.B. _____

B.C. _____

To _____
Town Clerk.

* When the Burgh is divided into Wards add here "for the Ward" [*specifying such Ward*].

SCHEDULE (C.)²

Burgh of [*specify Burgh*].

In Terms of the Municipal Elections Amendment (Scotland) Act 1868, I hereby give Notice that I have received Intimation that the following Persons are proposed for Election as Councillors in this Burgh at the Municipal Election on Tuesday next: *

¹ See notes to section 9.

The proposer and seconder of a person for election as a councillor for a ward should be electors qualified to vote in the ward for which the candidate is nominated. See Memorial and Opinion, Appendix XV.

² See notes to section 9.

* Where the Burgh is divided into Wards, the Names, &c. of Candidates, &c., for each Ward to be separately distinguished.

[78]

APPENDIX IX.

[31 & 32 Viet.

Name of Candidate.	Place of Abode of Candidate.	Names of Proposer and Seconder.	Places of of Propose Seconder

Given under my hand at [*specify Place and Date*]

*E.F.*_____

Town Clerk.

APPENDIX No. X.

MAGISTRATES, &c., ELECTION (SCOTLAND).

33 AND 34 VICT., CHAP. 92.

AN ACT TO AMEND THE LAWS FOR THE ELECTION OF THE A. D. 1870.
MAGISTRATES AND COUNCILLORS OF ROYAL AND PAR-
LIAMENTARY BURGHs IN SCOTLAND.—[9th August 1870.]

WHEREAS it is expedient to amend the laws relating to the election of the magistrates and councillors of Royal and Parliamentary Burghs in Scotland:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. This Act may be cited for all purposes as The Municipal Elections Amendment (SCOTLAND) Act, 1870. Short title.

II. The following expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, Interpretation of terms.

“Burgh” shall mean any Royal or Parliamentary Burgh in Scotland:

“Election Acts” shall mean the Acts third and fourth William the Fourth, chapters seventy-six and seventy-seven, and thirty-first and thirty-second Victoria, chapter one hundred and eight, and any other Acts relating to the election of magistrates and councillors of Royal and Parliamentary Burghs in Scotland which may be in force for the time:

"Registration Acts" shall mean the Act nineteenth twentieth Victoria, chapter fifty-eight, as amended by the Act thirty-first and thirty-second Victoria, chapter forty-eight, and any other Act relating to the registration of persons entitled to vote in election of members to serve in Parliament burghs in Scotland which may be in force for time:

"The assessor" shall mean the assessor of the burgh and for which he is assessor, appointed and acting under the Acts for the valuation of lands and buildings in Scotland, or any of them.

Election of councillors where number of persons proposed does not exceed vacancies to be supplied.

III. Where at any election of town councillors in burgh the number of persons whose names have been intimated to the town clerk, under the provisions of the thirty-first and thirty-second Victoria, chapter one hundred and eight, as persons proposed for election in such burgh or any ward of such burgh if divided into wards, does exceed the vacancies to be supplied in such burgh or ward as the case may be, the town clerk shall, in the public notice to be given by him, as provided by the said Act, the names of the persons so intimated to him, notify in respect the number of persons proposed for election does not exceed the number of vacancies to be supplied in such burgh or ward, as the case may be, there will be no poll, that the persons so proposed will be declared to be elected as councillors of the burgh; and such notification may be made by an addition in the terms set forth in the schedule to this Act, or in similar terms, to the notice required by the said Act; and on the day appointed for declaring the election the persons so proposed shall be declared to be duly elected as councillors of the burgh, in the same manner as if they had been elected as councillors under the provisions of the Election Acts, and shall be deemed to be duly elected accordingly; and every such election of councillors under the provisions of this Act shall be in all respects valid, and notice thereof shall be given to the persons elected in the same manner and to the same effect as is provided by the Election Acts.¹

IV. Where by any Act of Parliament it is provided that any commissioners or trustees under such Act are to

¹ See note to section 9 of "The Municipal Elections Amendment (Scotland) Act 1868."

elected by the municipal electors, or at the same time or along with the town councillors of any burgh, the provisions of the Election Acts shall be applicable to every such election of commissioners or trustees; and where at any such election the number of persons proposed for election as commissioners or trustees does not exceed the number of vacancies to be supplied, the town clerk or other person conducting such election shall notify that there will be no poll; and such election shall be proceeded with and declared in the same manner as is hereinbefore provided with respect to the election of town councillors.

Election
of Com-
missioners
or trustees
along with
town
council-
lors.

V. Where in any burgh or ward two or more councillors have been elected on the same day under the provisions of this Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the town council (including the councillors so elected) shall determine the order in which the councillors so elected shall retire from the town council.

Order of
retirement
of council-
lors to be
determined
by the
Council.

VI. In every royal burgh not now entitled to return or contribute to return a member to Parliament, the assessor shall, on or before the fifteenth day of September in the year one thousand eight hundred and seventy-one, and in every year thereafter, make out or cause to be made out a list of all persons who may be entitled to vote in the election of councillors for such burgh, under the provisions of the Act thirty-first and thirty-second Victoria, chapter one hundred and eight, according to the form No 1 of the schedule A. to the Act nineteenth and twentieth Victoria, chapter fifty-eight; and the same procedure shall be followed with respect to the preparation and publication of every such list, and the completion and revision of the register of voters for such burgh, as is provided by the Act nineteenth and twentieth Victoria, chapter fifty-eight, as amended by the Act thirty-first and thirty-second Victoria, chapter forty-eight, with respect to the lists and registers of voters to be made out and completed under the provisions and for the purposes of those Acts; and the lists of voters for any burgh made up, completed, and revised under the provisions of the said Acts and this Act shall be signed by the town clerk, and shall be the register of persons entitled to vote in such burgh at any election of town councillors which shall take place in and for such burgh between the thirty-first day of October in the year

Prepara-
tion of
municipal
registers
in burghs
which do
not return
members
to Parlia-
ment.

in which such register shall have been made up and the first day of November in the succeeding year; and the said register shall be printed, and copies thereof shall be kept by the town clerk and delivered to persons applying therefor, in the same manner and on the same terms as is provided by the Act nineteenth and twentieth Victoria chapter fifty-eight.

Cost of
municipal
registers.

VII. The whole costs and expenses of making up, completing, revising and printing the register of voters in any such burgh, or incident thereto, shall be ascertained and fixed, and the amount thereof shall be assessed, levied, and collected, in the same manner as the costs and expenses attending the annual registration under the Act nineteenth and twentieth Victoria, chapter fifty-eight, are by the said Act appointed to be ascertained, fixed, assessed, levied, and collected; and the provisions of the said Act shall be applicable to the costs and expenses of registration under this Act.

Municipal
elections
in burghs
divided
into wards
under
31 & 32
Vict. c.
108.

VIII. Where any burgh has been or shall be divided into wards under the provisions of the Act thirty-first and thirty-second Victoria, chapter one hundred and eight, the town councillors of such burgh shall be elected in the same manner as town councillors are elected in burghs divided into wards or districts under the provisions of the Acts third and fourth William the Fourth, chapter seventy-six and seventy-seven, and the provisions of these Acts respectively with reference to the election of councillors shall be and are hereby made applicable to elections of councillors in burghs which have been or shall be divided into wards under the provisions of the said Act thirty-first and thirty-second Victoria, chapter one hundred and eight.

Expense
of municipal
elections may
be defrayed out
of assessments
for registration.

IX. The town council of any burgh may from time to time resolve that the costs and expenses of and incident to the election of the town councillors of such burgh, or of any trustees, commissioners, or other persons who are appointed or have been in use to be elected along with such town councillors, shall be defrayed out of the assessments imposed or levied in such burgh under the provisions and for the purposes of the Registration Acts; and after such resolution shall have been adopted, the costs and

¹ See sections 16 and 17 of "The Municipal Elections Amendment (Scotland) Act 1868."

expenses of and incident to such elections, as ascertained and fixed by the town council, shall be added to the costs and expenses attending the annual registration in such burgh, and shall be included in the assessment to be imposed and levied under the provisions and for the purposes of the Registration Acts.¹

SCHEDULE.²

And I further give notice, in terms of The Municipal Elections Amendment (Scotland) Act, 1870, that in respect the number of persons proposed for election as councillors in the burgh [*or in the ward (or wards) or commissioners or trustees, as the case may be,*] does not exceed the number of vacancies to be supplied in the burgh, [*or ward*] there will be no poll, and the persons so proposed will on the day appointed for declaring the election be declared to be elected councillors of the burgh [*or commissioners or trustees, as the case may be*].

¹ See section 30 of the Act 3 and 4 Will. IV., cap. 76, and section 29 of the Act 3 and 4 Will. IV., cap. 77.

² See note to section 9 of "The Municipal Elections Amendment (Scotland) Act 1868."

APPENDIX No. XI.

ANNO DECIMO TERTIO & DECIMO QUARTO

VICTORIÆ REGINÆ

CAP. XXXIII.

AN ACT TO MAKE MORE EFFECTUAL PROVISION FOR REGULATING THE POLICE OF TOWNS AND POPULOUS PLACES IN SCOTLAND, AND FOR PAVING, DRAINING, CLEANSING LIGHTING, AND IMPROVING THE SAME.—[15th July 1850.]

Note—(1) By section 1 of "The General Police and Improvement (Scotland) Act 1862," this Act and the Act of 23 and 24 Victoria, c. 96 amending the same, and sections 60 to 70, both inclusive, of the Act 11 and 20 Victoria, c. 103, are repealed, "except only as regards any Burgh in which the provisions of the said Acts or any part thereof have, on or before the first day of August One thousand eight hundred and sixty two, been adopted, either in manner provided by the first recited Act, [13 and 14 Victoria, cap. 33] this Act, or by the incorporation of such provisions or any part thereof, with any Local or Special Act relating to any such Burgh."

(2) By section 29 of "The Ballot Act 1872," the term "municipal election" is declared to mean "as regards Scotland, an election of any person to serve the office of councillor or commissioner of any municipal borough, or of a ward or district of any municipal borough," and the term "municipal borough" is declared to mean "any place for the time being," subject, as regards Scotland, to the Acts 3 and 4 Will. IV., caps. 76 and 77; the Act 13 and 14 Vict., c. 33; and "The General Police and Improvement (Scotland) Act 1862," and any Acts amending the same. By rule 65 of schedule First of "The Ballot Act 1872," the expression "town clerk" is declared to include "the clerk appointed by the Commissioners of Police under the Act 13 and 14 Vict., c. 33," and "The General Police and Improvement (Scotland) Act 1862."

(3) Section 20 of "The Ballot Act 1872" enacts, that "the poll at every contested election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this act directed to be conducted at a contested parliamentary election, and, subject to the modifications

And with respect to Commissioners for the Purposes of this Act, be it enacted as follows :

XXVII. That the Commissioners for the Purpose of executing this Act, to be elected as hereinafter provided, shall be in Number either Six, Nine, or Twelve, as may be determined as aforesaid.¹ Number of Commissioners.

expressed in the schedules annexed hereto, such provisions of this act and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election," but subject always to various provisions ; after setting forth which, the section concludes thus :—" A municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this act had not passed."

(4) Section 22 of "The Ballot Act 1872" applies to Scotland, Part 2 of the act relating to municipal elections, subject to the following provision, "All municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in Schedule (C.) to the Act "3 and 4 Will. IV., c. 76," are directed to be conducted by the acts in force at the time of the passing of this act [The Ballot Act] as amended by this Act ; and all such acts shall apply to such elections accordingly."

(5) From these sections it appears that, except in so far as relates to the taking of the poll in contested elections, all elections of commissioners of police under and by virtue of the Act 13 and 14 Victoria, cap. 33, and "The General Police and Improvement (Scotland) Act 1862," must hereafter be conducted in the same way as elections of town councillors have hitherto been conducted in the several burghs specified in Schedule (C.) of the Act 3 and 4 Will. IV., cap. 76, and that at all contested elections of commissioners of police under the acts referred to, the poll must, as far as possible, be conducted as in parliamentary elections, subject to the modifications specified in section 20 of "The Ballot Act."

(6) Only these sections of the Act 13 and 14 Victoria, cap. 33, which relate to the election of commissioners, are here given.

¹ i.e., By the Householders present at the Meeting adopting the Act, or at some adjourned Meeting, in terms of section 25, which enacts,— "That where this Act shall be adopted in any Burgh, in whole or in part, the Resolution to adopt it shall not be subject to any further Question ; and, except in the Cases after mentioned, and where it may be necessary to provide for the special Election of Commissioners and Magistrates of Police, the Householders thereof present at the Meeting adopting this Act unanimously, or at some adjourned Meeting as aforesaid, shall then and there proceed to determine by a Majority of Votes, and shall set forth in their Minutes, the Number of Commissioners to be elected by the Householders to carry this Act into operation, and also whether such Burgh shall be divided into Wards for the Purposes of this Act, and, if so, the Bounds and Limits of such Wards."

By section 6 of "The General Police and Improvement (Scotland) Act 1862 Amendment Act" (31 and 32 Victoria, cap. 102), it is enacted as follows :—"The commissioners of any burgh, having a population exceeding ten thousand according to the census last taken at the time,

If Burgh
divided
into
Wards.

XXVIII. That where the Burgh shall be divided into Wards as aforesaid, the Number thereof, and the Number of Commissioners to be elected in manner hereinafter provided, shall be so settled and adjusted that there shall be Three such Commissioners for each such Ward.

Meeting
for Elec-
tion of
Commis-
sioners to
be con-
vened.

XXIX. That as soon as may be after the Deliverance of the Sheriff declaring that this Act shall apply, in whole or in part, to a Burgh adopting the same as aforesaid,² and where Commissioners are to be elected, the Chief or Senior Magistrate or Sheriff, as the Case may be,³ shall

in which the provisions of either of the recited acts (the Police Acts of 1850 and 1862) have already been adopted in whole or in part, not being a royal or parliamentary burgh, and not being already divided into wards for the purpose of such act, may from time to time apply to the Sheriff to divide such burgh into wards for the purposes of such act, so far as adopted as aforesaid, and of this act; and the Sheriff may, upon considering the matter, divide such burgh into such number of wards as he may find proper, and define the boundaries thereof, and fix the number of commissioners to be elected for each ward; and thereafter, and except as respects the number of commissioners, all the provisions with respect to the election and rotation of commissioners for burghs originally divided into wards, which are contained in the act whose provisions have been adopted as aforesaid in such burgh, shall apply to the election and rotation of commissioners for such burgh when divided into wards by the Sheriff under the powers hereby conferred on him; provided always, that the commissioners in office at the time of such division shall remain in office until the expiration of the year of office then current, and no longer."

¹ See note to previous section.

² i.e., By a majority of the householders present at a meeting convened to consider as to the adoption of the Act, or, in the event of a poll, by a majority of the persons qualified and voting in terms of the Act.

³ The chief or senior Magistrate of the burgh, if a Royal or Parliamentary Burgh, or if otherwise, the Sheriff of the county in which the burgh is situated.

How far "The Ballot Act 1872" has transferred this duty, in the case of Burghs not Royal or Parliamentary, from the Sheriff of the County to the chief or senior Magistrate, is not free from doubt. That Act appoints all municipal elections, including elections of commissioners of police under the General Police Acts of 1850 and 1862, to be conducted in the same way in which elections of councillors in the Royal Burghs contained in Schedule C. to the Act 3 & 4 William IV., c. 76, are appointed to be conducted; it defines the term "returning officer" to mean the mayor or other officer who, under the law relative to municipal elections, presides at such elections; and it declares the term "mayor" to mean, in Scotland, the provost or other chief magistrate of a municipal burgh, i.e., any place for the time being subject, *inter alia*, to the General Police Acts of 1850 and 1862. Interpreting these several provisions, it has been held by a committee of the Sheriffs of

convene a Meeting of the Householders of the Burgh,⁴ qualified as aforesaid,⁵ in the Town Hall or other con-

Scotland that the chief or senior magistrate of all burghs in which commissioners of police fall to be elected under the provisions of either of the General Police Acts, must now act as returning officers in such elections.

⁴ By section 2, the word "Householder" is declared to "mean a Male Occupier of a Dwelling House or other Heritable Subjects of the yearly Value of Ten Pounds or upwards;" but by the "General Police and Improvement (Scotland) Act 1862 Amendment Act," 1868, the word "Householder" is declared to mean "a Male Occupier of lands or premises of the yearly value of £4 and upwards, as appearing in the valuation roll."

By section 2 of this Act, it is enacted that the Word "Occupier" shall not include a Lodger or a Party in the Occupation as Tenant of a furnished House let for a less Period than One Year, but shall include the Party by whom such furnished House is so let.

⁵ By section 12, it is enacted,—"That at such Meeting [*i.e.*, the first Meeting called to consider as to the adoption of the Act] and generally at all Meetings and Elections under this Act, all Householders shall be entitled to vote; and Companies or Co-partnerships occupying Houses or other Heritable Subjects of the yearly Value of Ten Pounds or of greater Value, so as to afford more than One Qualification of Ten Pounds, shall be entitled to grant Authority in Writing to any One or more of the Partners of such Company or Co partnership to vote, and which Partner or Partners shall be deemed to be a Householder within the Meaning of this Act, and have Vote accordingly: Provided always, that such Company or Co-partnership shall not so authorise or have Right to vote by more than One Partner in respect of each Qualification of Ten Pounds afforded by such Premises: Provided also, that in case of any Difficulty arising as to the Qualification or Identity of any Householder, the same shall be decided by such Magistrate or Sheriff, whose Determination shall be final." This provision is amended by the "General Police and Improvement (Scotland) Act 1862 Amendment Act," section 4 of which declares "that not more than six partners of any company or co-partnership shall be entitled to vote in respect of the lands or premises occupied by each company or co-partnership."

But it is declared by section 5 of the Amendment Act above referred to, that "No 'householder' shall be entitled to have or give more than one vote at any meeting or election under the said recited acts [The Police Acts of 1850 and 1862]: Provided always that no householder shall be entitled to vote at any such meeting or election who shall have been exempted from payment of the whole or any part of his rates or assessment under the recited acts, on the ground of poverty or inability to pay, or who shall not have paid all rates or assessments due and payable by him under the recited acts at the time of so voting; and any vote given contrary to the provisions of this section shall be null and void.

The proof of the qualification of householders is by section 8 of the Act of 1850, declared to be a list of the names of all householders within the burgh, prepared under the order of the chief magistrate or Sheriff, by the collectors of the poor assessment within the burgh, and distinguishing the amount of rental at which each person is assessed. By the

venient Place within the Burgh, or, if the Burgh shall be divided into Wards, at some convenient Place in their respective Wards, to be specified in the Notice to be given of such Meeting, for the Election of Commissioners for the Purpose of executing this Act, all which Meetings shall be summoned in the same Way and Manner and at the same Distance of Time as is provided for the First Meeting to be held in virtue of this Act;* and in all such Burghs as shall be divided into Wards in manner herein provided[†] the Ward Meetings shall elect their own Preses; and the Commissioners shall be elected by such Meeting or by such Wards.[‡]

Election of
Commis-
sioners.

XXX. That such Election shall be proceeded with in manner following; (that is to say), any Householder of the Burgh shall be eligible to be elected a Commissioner for the Purposes of this Act, and may be proposed at such Meeting by any Householder, and may be seconded by any other Householder; and the Preses of the Meeting shall thereupon ascertain¹ and declare the Resolution

same section, however, it is enacted that, "in case it shall be expedient to obtain such list otherwise than from the collector's book, it shall be competent for such magistrate or Sheriff to cause an accurate list to be taken and made up by persons to be appointed for that purpose."

The qualification of persons entitled to vote in the election of commissioners under this act is not affected by "The Ballot Act 1872," and a separate roll must still be made up, including the names of firms, and the partner having right to vote as representing his firm will, in the opinion of the Solicitor-General and Mr Watson, be entitled to receive a ballot paper on producing a proper mandate. See Memorial and Opinion, Appendix XV.

* By section 11 of this Act, it is enacted that such first meeting "shall be held on a Day not less than Twenty-one Days or more than Thirty Days after such Magistrate or Sheriff shall have received such Requisition [i.e., a requisition by householders in terms of section 7 of the Act] to convene a Meeting as aforesaid; and Intimation thereof shall be made by posting Handbills within such Burgh Fourteen Days preceding the Day of the Meeting, in the Form of the Schedule marked (A.) [annexed to the Act], and by Tuck of Drum, or other Mode of Intimation usually adopted in such Burgh, Two Days in each Week for Two Weeks before such Meeting, or by open proclamation within such Burgh; and also by an Advertisement in any Newspaper published in such Burgh, and if no Newspaper be published therein, then in a Newspaper circulating in such Burgh, at least Three clear Days before the Day appointed for such Meeting."

[†] See note to section 27.

[‡] Section 29 is repealed by schedule Fifth of "The Ballot Act 1872," so far as its provisions are inconsistent with the provisions of that act. See note 4 to section 30.

¹ i.e., By a show of hands, or in such other manner as shall appear to him expedient. See section 14.

thereof in manner aforesaid; and if such Election shall not be unanimous, and if a Poll shall be demanded in Writing, in the Manner before provided,² at any Meeting for the Purposes of Election under this Act, such Magistrate or Sheriff or such Preses of such Meeting shall open and proceed with such Poll in the Manner hereinbefore provided;³ and such Magistrate or Sheriff or Preses of Wards respectively shall for that Purpose appoint a Clerk, and shall provide a Book in the Form of Schedule (C.) hereunto annexed, in which the Votes shall be entered, and shall declare the Result of such Poll as appearing on such Book; and such Magistrate or Sheriff or Preses shall be reimbursed all such reasonable Charges or Expenses as may be incurred in providing Clerks and Books, and otherwise in the Performance of the Duties hereby required of them, out of the Money assessed and levied under the Authority of this Act.⁴

XXXI. That the whole Commissioners so returned as aforesaid shall, at Twelve of the Clock Noon on the First MONDAY after such Election, hold their First General Meeting in the Town Hall or other convenient Place within such Burgh, with Power to adjourn to such other Place as they may think fit; and every Person who may consider that he ought to have been returned as a Commissioner may lodge a Complaint in Writing, signed by him or by some Person duly authorized on his Behalf,

First
Meeting of
Commis-
sioners.

² i.e., By any five persons present and qualified to vote. See section 14.

³ The manner of proceeding with a poll under the Act is prescribed by sections 15 and 16 of the Act, which are as follows,—

(15.) “That when such Poll shall be demanded as aforesaid, such Magistrate or Sheriff shall direct the same to be proceeded in at such Polling Place or Places and within such Period as he shall determine, not exceeding Two clear Days from the Day of the Date of such Demand in Writing, exclusive of *Sundays*, and the Polling shall commence at the Places intimated at Nine of the Clock of the Forenoon of the Day that shall be named.

(16.) “That no Poll by this Act authorised to be taken shall be kept open for more than One Day, and that only between the Hours of Nine in the Morning and Four in the Afternoon; and the Poll shall close at any Time after the Lapse of Two Hours without any qualified Person offering to vote.

⁴ Section 30 is repealed by schedule Fifth of “The Ballot Act 1872,” so far as its provisions are inconsistent with the provisions of that act.

Hereafter nominations of candidates for election as commissioners under this Act must be made, and the subsequent procedure must take place, as in the case of the burghs specified in Schedule (C.) of the Act 3 and 4 Will. IV., cap. 76. See Memorial and Opinion, Appendix XV.

with the Commissioners assembled at such Meeting, w shall thereupon remit to a Committee of Three or Five their Number to inquire into the Merits of such disput Election, and to report thereon to a subsequent Meeti of the Commissioners, and such Report shall be final; and in case there shall be an Equality of Votes at any Electic the Commissioners shall determine by Vote which of t Candidates shall be preferred; and no Election or Appoi ment under this Act shall be quashed or set aside c account of any Misnomer, Omission, or other Informality and every Party returned as a Commissioner shall b entitled to act until, upon a Scrutiny, his Return shall b quashed or set aside; and the Commissioners returne shall be entitled to act, though, by reason of Equality c Votes or otherwise, the full Number of Commissioner may not be filled up; and the Commissioners returne shall be arranged alphabetically according to thei Surnames, and where the Burgh is divided into Wards, th Commissioners for each Ward shall be kept in separat Lists.

Commis-
sioners to
choose a
Senior and
Two Junior
Magis-
trates of
Police.

XXXII. That the Commissioners shall, at such Fir Meeting or adjourned Meeting, by a Plurality of Voices (the Commissioner who had the greatest Number of Vote at the Election of Commissioners having a casting a double Vote in case of Equality), elect from among thei own Number a Senior and Two Junior Magistrates o Police.

Commis-
sioners to
be elected
annually.

XXXIII. That One Third of the Commissioners, o where the Burgh is divided into Wards, One Third of th Commissioners for each Ward, being in each Case those who are the highest on the List or Lists of Commissioner for the Time, shall go annually out of Office, *videlicet*, o the same Day at the Expiration of a Year on which Com missioners were last elected into Office, or on the nex lawful Day thereafter; and on the same or the nex lawful Day annually the Places of the Commissioner

¹ The Solicitor-General and Mr Watson having been consulted as t whether the provisions of this section as to disputed elections an equality of votes are still operative, or whether they are superseded b the enactments of the Ballot Act, have expressed the following opinion —“ This query is attended with difficulty, but we are disposed to thin that the enactments in the statutes of 1850 and 1862 with regard t disputed elections and equality of votes must be held as repealed being of a character inconsistent with the provisions of the Ballot Act. See Memorial and Opinion, Appendix XV.

going out of Office shall be supplied by an equal Number of new Commissioners, to be chosen from among the Householders of the Burgh *in the Manner aforesaid, under all the Rules, Regulations, and Provisions applicable to such First Meeting and Election*, and where the Burgh is divided into Wards the Place of each Commissioner going out of Office shall in all Cases under this Act be filled up by the Ward which returned him ;¹ and the like Notice of each such annual Meeting shall be given as is hereinbefore directed to be given of such First Meeting for the Election of Commissioners ; and the Commissioners elected at each annual Meeting, arranged alphabetically according to their Surnames, shall be placed at the Foot of the List of Commissioners, or, where the Burgh is divided into Wards, at the Foot of the List of Commissioners for their respective Wards ; and where the Senior Magistrate of Police would in ordinary Rotation be One of the Commissioners going out of Office, but remains to complete the Period of Three Years Service as such Senior Magistrate, another Commissioner, being the highest on the List, or, where the Burgh is divided into Wards, the highest on the List for the Ward by which such Senior Magistrate was elected, shall go out in the Room of such Senior Magistrate.

XXXIV. That any of such out-going Commissioners may be re-elected : Provided always, that no Person shall be eligible as a Commissioner, or entitled to vote at such Election, who shall have been relieved from the Assessment made on him for the Purposes of this Act for the Year immediately preceding on the Ground of Inability to pay the said Assessment, or by whom any Arrear of any Assessment due under this Act shall at the Time of the Election have been owing for the Space of a Month, and shall since it became due have been demanded, whether such Arrear shall be due by himself or by any Company or Co-partnership by which he is authorised to vote ; and a Certificate under the Hand of the Collector shall be deemed and taken to be sufficient Evidence of such Arrears or Relief.²

Out-going
Commis-
sioners
may be
re-elected.

¹ "The Ballot Act 1872" makes no change with respect to the periods at which the annual elections of commissioners, under this Act, are to take place. See Memorial and Opinion, Appendix XV.

² See the 5th section of The General Police and Improvement (Scotland) Act Amendment Act 1868, amending this clause to the effect stated in note 5 to clause 29 of this act.

Vacancies
in the Ma-
gistrates
of Police
how to be
supplied.

XXXV. That where any Magistrate of Police elected under this Act shall be in the Third of the Commissioners going out of Office, the Place of such Magistrate of Police shall be supplied by Election by the Commissioners as soon as the full Number thereof shall have been completed by the annual Election of the Third hereby directed to take place; and such Election shall be made by Plurality of Voices, and the Senior Magistrate of Police, or in his Absence the Commissioner whose Name is found highest on the Poll, shall have a double or casting Vote, in case of Equality: Provided always, that the Senior Magistrate shall always remain in Office for the Period of Three Years, and that he, as well as the Junior Magistrates shall at all Times be capable of being re-elected.

Interim
Vacancies
how to be
supplied.

XXXVI. That in case the Place of any of the Commissioners or Magistrates of Police elected as aforesaid shall become vacant by Death, Refusal to act, Disqualification, or Resignation, then and in such Cases it shall be lawful for the remaining Commissioners and Magistrates of Police to nominate Persons duly qualified to supply such Vacancies; and each Person so nominated shall have and enjoy the same Powers and Privileges as the Person in whose Stead he is nominated and shall remain in Office until the next Period of Election, when he shall go out of Office, and the Vacancy shall be supplied by the Household-ers of the Burgh, or, if the Burgh be divided into Wards, the Household-ers of the Ward.¹

If Electors
refuse, &c.
to elect,
Commis-
sioners
previously
in Office
may.

XXXVII. That if the Electors shall at any Time refuse or neglect to elect the whole or any Part of the Number of Commissioners originally fixed and agreed to, it shall be lawful for the Commissioners who held Office immediately before the Time specified for such Election to supply the Deficiency.

¹ See note to section 25 of the Act 3 and 4 Will. IV., c. 76.

APPENDIX No. XII.

ANNO VICESIMO QUINTO & VICESIMO SEXTO

V I C T O R I Æ R E G I N Æ.

CAP. CI.

AN ACT TO MAKE MORE EFFECTUAL PROVISION FOR REGULATING THE POLICE OF TOWNS AND POPULOUS PLACES IN SCOTLAND, AND FOR LIGHTING, CLEANSING, PAVING, DRAINING, SUPPLYING WATER TO AND IMPROVING THE SAME, AND ALSO FOR PROMOTING THE PUBLIC HEALTH THEREOF.—[7th August 1862.]

PART I.—SECTION V.

See notes introductory to the sections of the Act, 13 and 14 Vict., cap. 33, quoted in Appendix XI.

CLAUSES RELATING TO THE ELECTION OF COMMISSIONERS.

XLIV. In Burghs where Commissioners shall be elected as herein provided¹ for the Purposes of executing this

Number
of Com-
missioners.

¹ When the act is adopted in whole or in part in any Royal or Parliamentary burgh, the magistrates and council of such burgh for the time being are (under the exception after mentioned) declared, by section 40, to be commissioners for carrying this act, or such part thereof as is adopted, into operation ; and the magistrates of the burgh are declared to be the magistrates of police thereof.

When it is adopted in whole or in part in any Burgh of Regality or

Act, they shall not exceed Twelve in Number; but the Number may be less than Twelve and not less than Six, as may be determined on in manner hereinbefore provided.²

If Burgh
divided in-
to Wards.

XLV. Where the Burgh shall be divided into Wards as aforesaid,³ the Number of Wards and the Number of Commissioners to be elected shall be so settled and adjusted that there shall be Three Commissioners for each Ward.

XLVI. As soon as may be after the Deliverance of the Sheriff declaring that this Act shall apply, in whole or in

Barony having magistrates and a council (not being a burgh in which as bounded for the purposes of this act there shall be included any territory situated in a different county from that in which such burgh as previously bounded was situated), the magistrates and council for the time shall (under the exception after mentioned), if the householders so resolve, be the commissioners for carrying this act, or such part thereof as is adopted, into operation; and the magistrates of such burgh shall be the magistrates of police thereof; but in the event of no such resolution being come to by the householders, commissioners and magistrates of police must be elected for the burgh. See section 41.

When the act is adopted, in part, in any burgh having commissioners or trustees of police under the provisions of any local act of parliament, or of the Act 13 and 14 Victoria, c. 33, such commissioners or trustees are, by section 42, declared to be the commissioners for carrying such part of this act into operation, and no special election of commissioners is necessary.

² *i.e.* By the householders present at the meeting adopting the act, or at some adjourned meeting. See section 36.

³ *i.e.* By the householders present at the meeting adopting the act, or at some adjourned meeting. See section 36, which enacts that such householders "shall then and there proceed to determine by a majority of votes, and shall set forth on their minutes the number of Commissioners to be elected by the householders to carry this act into operation, and also whether such burgh shall be divided into wards for the purposes of this act, and, if so, the bounds and limits of such wards."

By section 6 of the General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1868, it is enacted that where any burgh having a population exceeding ten thousand, according to the census last taken at the time, has adopted the Police Acts of 1850 or 1862, in whole or in part, the commissioners of such burgh, if it is not a Royal or Parliamentary burgh, and if it has not been already divided into wards for the purpose of such acts, may from time to time apply to the Sheriff to divide such burgh into wards for the purposes of such acts so far as adopted, and the Sheriff may, upon considering the matter, divide such burgh into such number of wards as he may find proper, and define the boundaries thereof and fix the number of commissioners to be elected for each ward. See note to section 27 of the Act 13 and 14 Vict., cap 33.

part, to any Burgh adopting the same, and for which Commissioners fall to be elected under this Act, the Chief or Senior Magistrate of such Burgh, if a Royal or Parliamentary Burgh, or if otherwise, the Sheriff,¹ shall convene a Meeting of the Householders² of the Burgh in the Town Hall or other convenient Place within the Burgh, for the Election of Commissioners for the Purpose of executing this Act, and the Commissioners shall be elected by such

Meeting
for Elec-
tion of
Commis-
sioners to
be con-
vened.

¹ How far "The Ballot Act 1872" has transferred this duty, in the case of Burghs not Royal or Parliamentary, from the Sheriff of the County to the chief or senior Magistrate, is not free from doubt. That Act appoints all municipal elections, including elections of commissioners of police under the General Police Acts of 1850 and 1862, to be conducted in the same way in which elections of councillors in the Royal Burghs contained in Schedule C to the Act 3 & 4 William IV. c. 75, are appointed to be conducted; it defines the term "returning officer" to mean the mayor or other officer who, under the law relative to municipal elections, presides at such elections; and it declares the term "mayor" to mean, in Scotland, the provost or other chief magistrate of a municipal burgh, *i.e.*, any place for the time being subject, *inter alia*, to the General Police Acts of 1850 and 1862. Interpreting these several provisions, it has been held by a committee of the Sheriffs of Scotland that the chief or senior Magistrate of all burghs in which commissioners of Police fall to be elected under the provisions of either of the General Police Acts, must now act as returning officers in such elections.

² The word "Householder" is declared by section 3 of this Act to mean "a male occupier of lands or premises of the yearly value of ten pounds or upwards, in all burghs, except in populous places containing less than one thousand inhabitants, and in populous places containing less than that number of inhabitants, it shall mean a male occupier of lands or premises of the yearly value of six pounds or upwards." The word "occupier" shall include tenant, but shall not include a lodger or a person in the occupation as tenant of a furnished house let for a less period than one year, but shall include the person by whom such furnished house is so let. But by the "General Police and Improvement (Scotland) Act 1862, Amendment Act 1868," the word "Householder" is declared to mean "a male occupier of lands or premises of the yearly value of £4 and upwards, as appearing in the valuation roll."

It is enacted by section 27, that "at such meeting [*i.e.*, the first meeting called to consider as to the adoption of the Act] and generally at all meetings and elections under this Act, all householders shall be entitled to vote; and companies or co-partnerships occupying lands or premises of the yearly value required for the qualification of a householder as before defined, or of greater value, so as to afford more than one such qualification, shall be entitled to grant authority in writing to any one or more of the partners of such company or co-partnership to vote, and which partner or partners shall be deemed to be a householder within the meaning of this Act, and be entitled to vote accordingly: Provided always, that such company or co-partnership shall not so authorize or have right to vote by more

Meeting, of which Meeting such Magistrate or Sheriff shall be Preses, or, if the Burgh shall be divided into Wards, such Magistrate or Sheriff shall convene a Meeting of the Householders in each Ward, at some convenient Place in the Ward to be specified in the Notice to be given of such Meeting for the Election of Commissioners for the Purpose of executing this Act, and the Commissioners for each Ward shall be elected by the Meeting in such Ward, as the Householders present at such Ward Meeting shall elect the Preses of such Meeting; and all Meetings for electing Commissioners shall be summoned in the same Manner and at the same Distance of Time as is provided for the First Meeting to be held with respect to the Adoption of this Act.³

than one partner in respect of each such qualification afforded by such premises: Provided also, that in case of any difficulty arising as to the qualification or identity of any householder, the same shall be decided at such meeting by such magistrate or Sheriff, whose determination shall be final." This provision is amended by the "General Police and Improvement (Scotland) Act 1862 Amendment Act 1868," section 4, which declares "that not more than six partners of any company or co-partnership shall be entitled to vote in respect of the lands or premises occupied by each company or co-partnership." But it is declared by section 5 of the Amendment Act above referred to, that "No 'householder' shall be entitled to have or give more than one vote at any meeting or election under the said recited acts (The Police Acts of 1857 and 1862); provided always, that no householder shall be entitled to vote at any such meeting or election who shall have been exempted from payment of the whole or any part of his rates or assessment under the recited acts on the ground of poverty or inability to pay, or who shall not have paid all rates or assessments due and payable by him under the recited acts at the time of so voting; and any vote given contrary to the provisions of this section shall be null and void."

* Such first meeting, it is enacted by section 26, shall be held on a day not less than twenty-one days or more than thirty days after the magistrate or Sheriff shall have received a requisition to convene a meeting, and intimation thereof shall be made by posting handbills within the burgh fourteen days preceding the day of the meeting, in the form of the schedule marked (A) annexed to the Act, and by any mode of intimation usually adopted in the burgh, two days in each week for two weeks before such meeting, or by open proclamation within the burgh, and also by an advertisement in any newspaper published in the burgh, and if no newspaper be published therein, then in a newspaper circulating in the burgh, at least three clear days before the day appointed for such meeting.

This section is repealed by Schedule Fifth of "The Ballot Act 1872, so far as its provisions are inconsistent with the provisions of the said Act.

XLVII. Such Election shall be proceeded with in manner following: (that is to say), any Householder¹ of the Burgh shall be eligible to be elected a Commissioner for the Purposes of this Act, and may be proposed and seconded by any Householders within the Burgh, or if such Burgh shall have been divided into Wards, then by any Householders within the Ward for which the Election is to take place; and the Preses of the Meeting shall ascertain and declare the Resolution thereof in manner hereinbefore provided in regard to Meetings held with respect to the Adoption of this Act;² *and if such Election shall not be unanimous, and if a Poll shall be demanded in Writing by any Seven Householders present at such Meeting, such Magistrate or Sheriff shall open and proceed with such Poll in the Manner hereinbefore provided in regard to Polls with respect to the Adoption of this Act,*³

¹ See note 1 to section 46 of this Act.

² It is enacted by section 29, that the magistrate or Sheriff shall ascertain the determination of such meetings by a show of hands, or in such other manner as shall appear to him expedient, and shall declare the same, which declaration shall be final, unless a poll shall be then demanded in writing by any seven persons present and qualified to vote at such meeting.

³ The following sections provide for the taking of a poll under the Act:—

“XXX. When such poll shall be demanded as aforesaid, such magistrate or Sheriff shall direct the same to be proceeded in at such polling place or places and within such period as he shall determine, not exceeding two clear days from the date of such demand in writing, exclusive of Sundays, and the polling shall commence at the places intimated at nine of the clock of the forenoon of the day that shall be named.

“XXXI. No poll by this Act authorized to be taken shall be kept open for more than one day, and that only between the hours of nine in the morning and four in the afternoon. [See note 1 to section 9 of the Act 3 and 4 Will. IV. c. 76.]

“XXXII. Such magistrate or Sheriff shall, either in person or by a legal substitute or substitutes, whom he is hereby authorized to appoint when necessary, preside at the poll, and shall direct the necessary number of poll clerks to be appointed, and of poll books to be prepared in the form of Schedule (B) hereunto annexed, in which books shall be inscribed by such clerks the situation of the premises in respect of which the voter is qualified, and the manner in which he votes: Provided always, that such substitute or substitutes shall possess the qualifications required for the assessor and substitute under the said Act third and fourth William the Fourth, chapter seventy-six.” [See note 6 to section 8 of the Act 3 and 4 Will. IV. c. 76.]

and shall provide Poll Books in the Form of Schedule (C) hereunto annexed, in which the Votes shall be entered,⁴ and shall declare the Result of such Poll as appearing on such Books; and such Magistrate or Sheriff shall be reimbursed all such reasonable Charges or Expenses as may be incurred in providing Clerks and Books, and otherwise in the Performance of the Duties hereby required of the out of the Police Assessment levied under the Authority of this Act.⁵

First Meeting of Commissioners.

XLVIII. The Commissioners elected under this Act shall, at Twelve of the Clock Noon on the First MONDAY after the First and each annual Election, hold their First General Meeting in the Town Hall or other convenient Place within the Burgh, with Power to adjourn to any other Day or Place which they may think fit; and every Person who may consider that he ought to have been returned as a Commissioner may lodge a Complaint in Writing, signed by him or by some other Person duly authorized on his Behalf, with the Commissioners assembled at such Meeting, who shall thereupon remit to a Committee of Three or Five of their Number to inquire into the Merits of such disputed Election, and to report thereon to a subsequent Meeting of the Commissioners and such Report shall be final; and in case there shall be an Equality of Votes at any Election, the Commissioner shall determine by Vote which of the Candidates shall be

⁴ The proof of the qualification of householders is by section 24 declared to be a list of the names of all householders within the burgh, prepared under the order of the chief magistrate or Sheriff, by the assessors under the Valuation Acts within the burgh, and distinguishing the amount of rental at which each person is assessed. The qualification of the person entitled to vote in the election of commissioners under this act is not affected by "The Ballot Act 1872," and a separate roll must still be made up, including the names of firms, and the partner having right to vote as representing his firm will, in the opinion of the Solicitor General and Mr Watson, be entitled to receive a ballot paper on producing a proper mandate. See Memorial and Opinion, Appendix XV.

⁵ This section is repealed by schedule Fifth of "The Ballot Act 1872," so far as its provisions are inconsistent with the provisions of the said Act.

Hereafter nominations of candidates for election as commissioners under this act must be made, and the subsequent procedure must take place as in the case of the burghs specified in Schedule (C) of the Act 3 and 4 Will. IV., c. 76. See Memorial and Opinion, Appendix XV.

preferred;¹ and no Election or Appointment under this Act shall thereafter be liable to be challenged, and no such Election or Appointment shall be quashed or set aside on account of any Misnomer, Omission, or other informality; and every Party returned as a Commissioner shall be entitled to act until upon a Scrutiny his Return shall be quashed or set aside; and the Commissioners returned shall be entitled to act, although from any Cause the full Number of Commissioners may not be filled up.

XLIX. The Commissioners shall at such First Meeting or adjourned Meeting, by a Plurality of Votes, (the commissioner who had the greatest Number of Votes at the Election of Commissioners having a casting or double Vote in case of Equality,) elect from among their own Number a Senior and Two Junior Magistrates of Police.

Commissioners to choose a Senior and Two Junior Magistrates of Police.

L. One Third of the Commissioners, or, where the Burgh is divided into Wards, One Third of the Commissioners for each Ward, shall go annually out of Office on the same Day of the Month as that on which the Commissioners were elected into Office, or on the next lawful Day thereafter in each Year, and on the same Day of the Month, or the next lawful Day annually, the Places of the Commissioners going out of Office shall be supplied by an equal Number of new Commissioners to be chosen from among the Householders of the Burgh *in the Manner aforesaid, under all the Rules, Regulations, and Provisions applicable to such First Election, and the like Notice of such annual Election shall be given as is herein-before directed to be given of such First Election of Commissioners.*¹

One Third of Commissioners to be elected annually.

LI. The Third of the Commissioners who shall go out of Office at the Expiration of the First Year after the First Election under this Act shall consist of the Commissioners

First and Second annual Elections.

¹ See note 1 to section 31 of the Act 13 and 14 Victoria, c. 33.

¹ Section 50 is repealed by schedule Fifth of the Ballot Act 1872, so far as its provisions are inconsistent with the provisions of the said Act.

"The Ballot Act 1872" makes no change with respect to the periods at which the annual elections of commissioners under this act are to take place. See Memorial and Opinion, Appendix XV.

who at said First Election had the smallest Number of Votes, and where the Burgh is divided into Wards, of the Commissioners who at said First Election in each Ward had the smallest Number of Votes; and the Commissioners who shall go out of Office at the Expiration of the Second Year after said First Election shall consist of the Commissioners who had the next smallest Number of Votes at the said First Election, or where the Burgh is divided into Wards, of the Commissioners in each Ward who at said First Election had the next smallest Number of Votes in each Ward; and thereafter the Third of the Commissioners who shall annually go out of Office shall consist of the Commissioners who have been longest in Office: Provide always, that in any Case where there shall have been an Equality of Votes, the other Commissioners remaining in Office shall decide, at a Meeting convened for the Purpose, which Commissioner having an Equality of Votes shall go out of Office; provided also, that the Senior Magistrate of Police shall always remain in Office for Three Years, and for that Purpose he shall be held to have had the largest Number of Votes at the said First Election, and to have been the shortest Period in Office at all Elections subsequent to the Third Election under this Act.

Commissioners failing to accept.

LII. If any Person elected as a Commissioner shall fail to attend the Meeting hereby appointed to be held on the First Monday after the First and each annual Election of Commissioners, he shall be held to have declined the Office of Commissioner, unless he transmit to the Meeting sufficient written Explanation, signed by himself or his Agent, of the Cause of his Absence, and intimating his Acceptance.

Outgoing Commissioners may be re-elected.

LIII. Any Magistrate of Police or Commissioner may resign his Office at any Time, on giving Three Week Notice of such his Intention in Writing to the Clerk, and any out-going Commissioner may be re-elected: Provide always, that no Person shall be eligible as a Commissioner or entitled to vote at such Election, who shall have been relieved from the Assessment made on him for the Purpose of this Act for the Year immediately preceding, on the Ground of Inability to pay the said Assessment, or by whom any Arrear of any Assessment under this Act shall

at the Time of the Election be owing, and shall have been demanded, whether such Arrear shall be due by himself or by any Company or Co-partnership by which he is authorized to vote; and a Certificate under the Hand of the Collector shall be deemed and taken to be sufficient Evidence of such Arrears or Relief.

LIV. Where any Magistrate of Police elected under this Act shall be in the Third of the Commissioners going out of Office, the Place of such Magistrate of Police shall be supplied by Election by the Commissioners as soon as the full Number thereof shall have been completed by the annual Election of the Third hereby directed to take place; and such Election shall be made by Plurality of Voices, and the Senior Magistrate of Police, or in his Absence the Preses of the Meeting, to be chosen by the Meeting, shall have a double or casting Vote, in case of Equality: Provided always, that Magistrates of Police shall at all Times be capable of being re-elected.

Vacancies
in the Ma-
gistrates of
Police,
how to be
supplied.

LV. In case the Place of any of the Commissioners or Magistrates of Police elected as aforesaid shall become vacant by Death, Refusal to accept, Disqualification, or Resignation, then and in such Cases it shall be lawful for the remaining Commissioners to nominate Persons duly qualified to supply such Vacancies; and each Person so nominated shall have and enjoy the same Powers and Privileges as the Person in whose Stead he is nominated, and shall remain in Office until the next Period of Election, when he shall go out of Office, and the Vacancy shall be supplied by the Householders of the Burgh, or, if the Burgh be divided into Wards, the Householders of the Ward in which the Vacancy shall have occurred; and in the event of a Resignation being intimated, so as to take effect at the Period of the annual Election of Commissioners, the Vacancy so caused shall be supplied by the Householders, or if the Burgh is divided in Wards, by the Householders of the Ward in which the Vacancy shall have occurred, by Election at the said Period of Election.¹

Interim
Vacancies
how to be
supplied.

¹ See note to section 25 of the Act 3 and 4 Will. IV., c. 76.

If Electors
refuse to
elect, Com-
missioners
previously
in Office
may.

LVI. If the Householders shall at any Time refuse or neglect to elect the whole or any Part of the Number of Commissioners, it shall be lawful for the Commissioners who held Office at the Time when such Election should have taken place to supply the Deficiency, by such a the like Proceedings as are provided for in the Case of interim Vacancies.

APPENDIX No. XII^A.

ANNO TRICESIMO PRIMO ET TRICESIMO SECUNDO

VICTORIÆ REGINÆ.

CAP. CII.

AN ACT TO ALTER THE QUALIFICATIONS OF THE ELECTORS IN PLACES IN *Scotland* UNDER THE "GENERAL POLICE AND IMPROVEMENT (*Scotland*) ACT, 1862," OR UNDER THE ACT THIRTEEN AND FOURTEEN *Victoria*, CHAPTER THIRTY-THREE, AND TO AMEND THE SAID ACTS IN CERTAIN OTHER RESPECTS.—[31st *July* 1868.]

WHEREAS it is expedient to alter the Qualifications of the electors in *Scotland* under the "General and Police Improvement (*Scotland*) Act, 1862," or under the Act Thirteen and Fourteen *Victoria*, Chapter Thirty-Three, and to amend the said acts in certain other respects :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. This Act may be cited for all purposes as the "General Police and Improvement (*Scotland*) Act, 1862, Amendment Act."

II. The recited Acts and this Act shall be read and construed together.

III. The Word "Householder" in the recited Acts shall no longer have, for the purposes of those Acts, the meaning assigned to it in the third clause of the first-recited act and the second section of the second-recited

Short
Title.
Recited
Acts and
this Act
to be as
One.

Meaning
of "House-
holder" in
recited
Acts.

act, but shall for the purposes foresaid mean ‘a male occupier of lands or premises of the yearly value of Four Pounds and upwards as appearing on the valuation roll.’

Amendment of Sect. 27 and 12 of recited Acts.

IV. The Twenty-seventh Clause of the first-recited act and the Twelfth Section of the second-recited act shall be read and construed as if the following Provisions were inserted therein: ‘Provided farther, that not more than Six Partners of any Company or Copartnership shall be entitled to vote in respect of the Lands or Premises occupied by such Company or Copartnership.’

Conditions of Voting.

V. No “Householder” shall be entitled to have or give more than One Vote at any Meeting or Election under the said recited Acts: Provided always, that no Householder shall be entitled to vote at any such Meeting or Election who shall have been exempted from Payment of the whole or any Part of his Rates or Assessment under the recited acts on the ground of Poverty or Inability to pay, or who shall not have paid all Rates or Assessments due and payable by him under the recited acts at the Time of so voting; and any Vote given contrary to the Provisions of this Section shall be null and void.

Provision as to dividing Burghs into Wards.

VI. The Commissioners of any Burgh, having a Population exceeding Ten Thousand¹ according to the Census last taken at the Time, in which the Provisions of either of the recited acts have already been adopted in whole or in part, not being a Royal or Parliamentary Burgh, and not being already divided into Wards for the Purposes of such Act, may from Time to Time apply to the Sheriff to divide such Burgh into Wards for the Purposes of such act, so far as adopted as aforesaid, and of this act; and the Sheriff may, upon considering the Matter, divide such Burgh into such number of Wards as he may find proper, and define the Boundaries thereof, and fix the Number of Commissioners to be elected for each Ward; and thereafter, and except as respects the Number of Commissioners, all the Provisions with respect to the Election and Rotation of Commissioners

¹ For the words ‘Ten Thousand’ the words ‘Five Thousand’ are substituted by the Burghs (Division into Wards) Amendment Act, 1876 (39 & 40 Vict. cap. 25, s. 3).

for Burghs originally divided into Wards, which are contained in the act whose Provisions have been adopted as aforesaid in such Burgh, shall apply to the Election and Rotation of Commissioners for such Burgh when divided into Wards by the Sheriff under the Powers hereby conferred on him; provided always, that the Commissioners in Office at the Time of such Division shall remain in Office until the expiration of the Year of Office then current, and no longer.

VII. The Commissioners and Magistrates of Police of *Galashiels* elected under the first-recited Act, and holding Office at the passing of this Act, shall continue to hold and exercise their respective Offices, and to perform the whole Duties and Functions thereof, until the first *Tuesday* of *December* next One thousand eight hundred and sixty-eight, when the whole Duties and Functions aforesaid shall vest in and devolve upon the Magistrates and Town Council of said Burgh of *Galashiels*, and the said Magistrates and Council as Commissioners, and the said Magistrates as Magistrates of Police, shall thenceforth have all the Powers, Privileges, and Jurisdiction of Commissioners and Magistrates of Police respectively under the said first-recited Act.

VIII. Whereas Doubts have been entertained as to the Validity of the Proceedings at certain Meetings held with the view of adopting the Provisions, in whole or in part, of the first-recited Act, or of electing Commissioners of Police under the said Act: Be it enacted, That, except in so far as the Validity of any such Proceedings has at the passing hereof been submitted to the Consideration of any Court of Law, all Proceedings at any Meetings which have been held with the view of adopting the Provisions, in whole or in part, of the first-recited Act, or of electing Commissioners of Police under the said Act, and all Proceedings which have followed thereon, shall be held to be valid and effectual, and not subject to Challenge on the Ground of Want of Compliance with the Provisions of the said first-recited Act.



APPENDIX No. XIII.

PARLIAMENTARY AND MUNICIPAL ELECTIONS.

35 AND 36 VICT., CHAP. 33.

AN ACT TO AMEND THE LAW RELATING TO PROCEDURE AT PARLIAMENTARY AND MUNICIPAL ELECTIONS.—[18th July 1872.] A.D. 1872. —

WHEREAS it is expedient to amend the law relating to procedure at parliamentary and municipal elections: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PARLIAMENTARY ELECTIONS.

Procedure at Elections.

I. A candidate for election to serve in Parliament for a county or borough shall be nominated in writing. The writing shall be subscribed by two registered electors of such county or borough as proposer and seconder, and by eight other registered electors of the same county or

Nomina-
tion of
candidates
for parlia-
mentary
elections.

borough as assenting to the nomination, and shall be delivered during the time appointed for the election to the returning officer by the candidate himself, or his proposer or seconder.

If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, and return their names to the Clerk of the Crown in Chancery; but if at the expiration of such hour more candidates stand nominated than there are vacancies to be filled up, the returning officer shall adjourn the election and shall take a poll in manner in this Act mentioned.

A candidate may, during the time appointed for the election, but not afterwards, withdraw from his candidature by given a notice to that effect, signed by him, to the returning officer: Provided, that the proposer of a candidate nominated in his absence out of the United Kingdom may withdraw such candidate by a written notice signed by him and delivered to the returning officer, together with a written declaration of such absence of the candidate.

If after the adjournment of an election by the returning officer for the purpose of taking a poll, one of the candidates nominated shall die before the poll has commenced, the returning officer shall, upon being satisfied of the fact of such death, countermand notice of the poll, and all the proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death; provided that no fresh nomination shall be necessary in the case of a candidate who stood nominated at the time of the countermand of the poll.¹

Poll at
elections.

II. In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and description of the candidates. Each ballot

¹ The provisions of "The Ballot Act 1872" do not apply to the nominations of candidates at municipal elections. These nominations must be lodged with the town clerk, and publicly intimated by him, in terms of "The Municipal Elections Amendment (Scotland) Act 1868," and "The Municipal Elections Amendment (Scotland) Act 1870." See Memorial and Opinion, Appendix XV.

paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face.¹ At the time of voting, the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called "the presiding officer") after having shown to him the official mark at the back.²

Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything, except the said number on the back, is written or marked by which the voter can be identified, shall be void and not counted.³

After the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer,⁴ and that officer shall, in the presence of such agents,⁵ if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given,⁶ and return their names to the Clerk of the Crown in Chancery.⁷ The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return.⁸

¹ See rule 22 of schedule First.

² See rules 24 and 25 of schedule First.

³ See rule 36 of schedule First.

⁴ See rule 29 of schedule First.

⁵ See sub-section (6) of section 20, relative to the appointment of agents of candidates in municipal elections.

⁶ See rules 32 to 37, both inclusive, and rules 45 and 48 of schedule First of this act, and the note to section 10 of the Act 3 and 4 Will. IV., cap. 76.

⁷ No return is to be made to the Clerk of the Crown in the case of municipal elections. See sub-section (5) of section 20.

⁸ In municipal elections the term petition, &c., means any proceeding in which a municipal election is questioned. See sub-section (2) of section 20.

Where an equality of votes is found to exist between any candidates at an election for a county or borough, and the addition of a vote would entitle any of such candidates to be declared elected, the returning officer, if a registered elector of such county or burgh, may give such additional vote, but shall not in any other case be entitled to vote at an election for which he is returning officer.¹

Offences at Elections.

Offences in
respect of
nomination
papers,
ballot
papers, and
ballot
boxes.

III. Every person who,—

- (1.) Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper, knowing the same to be forged; or
- (2.) Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper; or
- (3.) Without due authority supplies any ballot paper to any person; or
- (4.) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or
- (5.) Fraudulently takes out of the polling station any ballot paper; or
- (6.) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election;

shall be guilty of a misdemeanor, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour.

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be

¹ By sub-section (7) of section 20 it is declared that the provisions of this act with respect to the voting of a returning officer shall not apply in the case of a municipal election.

stated to be in the returning officer at such election, as well as the property in the counterfoils.

IV. Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark, and no such officer, clerk, or agent, and no person whosoever, shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.

Infringe-
ment of
secrecy.

Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour.¹

Amendment of Law.

V. The local authority (as herein-after defined) of every county shall by order, as soon as may be practicable after the passing of this Act, divide such county into polling districts, and assign a polling place to each district, in

Division of
counties
and bor-
oughs into
polling dis-
tricts.

¹ See rule 54 of schedule First.

such manner that, so far as is reasonably practicable, every elector resident in the county shall have a polling place within a distance not exceeding four miles from his residence, so, nevertheless, that a polling district need not in any case be constituted containing less than one hundred registered electors.

The local authority (as herein-after defined) of every borough shall take into consideration the division of such borough into polling districts, and, if they think it desirable, by order, divide such borough into polling districts in such manner as they may think most convenient for taking the votes of the electors at a poll.

The local authority of every county and borough shall, on or before the first day of May one thousand eight hundred and seventy-three, send to one of Her Majesty's Principal Secretaries of State, to be laid by him before both Houses of Parliament, a copy of any order made by such authority in pursuance of this section, and a report, in such form as he may require, stating how far the provisions of this Act with respect to polling districts have been complied with in their county or borough; and if they make any order after the first day of May one thousand eight hundred and seventy-three, with respect to polling districts or polling places in their county or borough, they shall send a copy of such order to the said Secretary of State, to be laid by him before both Houses of Parliament.

The local authority of a county or borough in this section means the authority having power to divide such county or borough into polling districts under section thirty-four of the Representation of the People Act, 1867, and any enactments amending that section; and such authority shall exercise the powers thereby given to them for the purposes of this section; and the provisions of the said section as to the local authority of a borough constituted by the combination of two or more municipal boroughs shall apply to a borough constituted by the combination of a municipal borough and other places, whether municipal boroughs or not; and in the case of a borough of which a town council is not the local authority, and which is not wholly situate within one petty sessional division, the justices of the peace for the county in which such borough or the larger part thereof in area is situate, assembled at some court of general or quarter sessions, or at some adjournment thereof, shall be the local authority

thereof, and shall for this purpose have jurisdiction over the whole of such borough; and in the case of such borough and of a county, a court of general sessions shall be assembled within twenty-one days after the passing of this Act, and any such court may be assembled and adjourned from time to time for the purpose.

No election shall be questioned by reason of any non-compliance with this section or any informality relative to polling districts or polling places, and any order made by a local authority in relation to polling districts or polling places shall apply only to lists of voters made subsequently to its date, and to registers of voters formed out of such lists, and to elections held after the time at which a register of voters so formed has come into force: Provided that where any such order is made between the first day of July and the first day of November in any year, and does not create any new division between two or more polling districts of any parish for which a separate poor rate is or can be made, such order shall apply to the register of voters which comes into force next after such order is made, and to elections held after that register so comes into force; and the clerk of the peace or town clerk, as the case may be, shall copy, print, and arrange the lists of voters for the purpose of such register in accordance with such order.¹

VI. The returning officer at a parliamentary election may use, free of charge, for the purpose of taking the poll at such election, any room in a school receiving a grant out of moneys provided by Parliament, and any room the expense of maintaining which is payable out of any local rate, but he shall make good any damage done to such room, and defray any expense incurred by the person or body of persons, corporate or unincorporate, having control over the same on account of its being used for the purpose of taking the poll as aforesaid.

Use of
school and
public
room for
poll.

The use of any room in an unoccupied house for the purpose of taking the poll shall not render any person liable to be rated or to pay any rate for such house.²

¹ By sub-section (4) of section 16, it is enacted that the provisions of this act relating to the division of counties and boroughs into polling districts shall not apply to Scotland.

² By sub-section (7) of section 20, it is enacted that the provisions of this act, with respect to the use of a room for taking a poll, shall not apply in the case of a municipal election.

Conclu-
siveness of
register of
voters.

VII. At any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote: Provided that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute, or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting.¹

Duties of Returning and Election Officers.

General
powers and
duties of
returning
officer.

VIII. Subject to the provisions of this Act, every returning officer shall provide such nomination papers, polling stations,² ballot boxes,³ ballot papers,⁴ stamping instruments,⁵ copies of register of voters,⁶ and other things, appoint and pay such officers,⁷ and do such other acts and things as may be necessary for effectually conducting an election in manner provided by this Act.

All expenses properly incurred by any returning officer in carrying into effect the provisions of this Act, in the case of any Parliamentary election, shall be payable in the same manner as expenses incurred in the erection of polling booths at such election are by law payable.⁸

Where the sheriff is returning officer for more than one county as defined for the purposes of parliamentary elections, he may, without prejudice to any other power, by writing under his hand, appoint a fit person to be his deputy for all or any of the purposes relating to an election in any such county, and may, by himself or such deputy, exercise any powers and do any things which the

¹ By sub-section (7) of section 20, it is enacted that the provisions of this act with respect to the right to vote of persons whose names are on the register of voters, shall not apply in the case of a municipal election.

² See note 2 to section 9 of 3 and 4 Will. IV., c. 76, and sub-section (3) of section 20 of this act. See also rules 15 to 17, both inclusive, of schedule First.

³ See rule 23 of schedule First.

⁴ See rule 22 of schedule First.

⁵ See rule 20 of schedule First.

⁶ See rule 20 of schedule First.

⁷ See rules 21 and 48 of schedule First, and section 16, sub-section (5.)

⁸ See sub-section (5) of section 16, and sub-section (4) of section 20.

returning officer is authorised or required to exercise or do in relation to such election. Every such deputy, and also any under sheriff, shall, in so far as he acts as returning officer, be deemed to be included in the term returning officer in the provisions of this Act relating to Parliamentary elections, and the enactments with which this part of this Act is to be construed as one.

IX. If any person misconducts himself in the polling station, or fails to obey the lawful orders of the presiding officer, he may immediately, by order of the presiding officer, be removed from the polling station by any constable in or near that station, or any other person authorised in writing by the returning officer to remove him; and the person so removed shall not, unless with the permission of the presiding officer, again be allowed to enter the polling station during the day. Keeping order in station.

Any person so removed as aforesaid, if charged with the commission in such station of any offence, may be kept in custody until he can be brought before a justice of the peace.

Provided that the powers conferred by this section shall not be exercised so as to prevent any elector who is otherwise entitled to vote at any polling station from having an opportunity of voting at such station.¹

X. For the purpose of the adjournment of the poll, and of every other enactment relating to the poll, a presiding officer shall have the power by law belonging to a deputy returning officer; and any presiding officer and any clerk appointed by the returning officer to attend at a polling station shall have the power of asking the questions and administering the oath authorised by law to be asked of and administered to voters, and any justice of the peace and any returning officer may take and receive any declaration authorised by this Act to be taken before him.² Powers of presiding officer, and administration of oaths, &c.

XI. Every returning officer, presiding officer, and clerk who is guilty of any wilful misfeasance or any wilful act or omission in contravention of this Act shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding one hundred pounds. Liability of officers for misconduct.

¹ See rule 50 of schedule First.

² See rule 50 of schedule First.

30 & 31
Vic. c.
102.

Section fifty of the Representation of the People Act, 1867, (which relates to the acting of any returning officer, or his partner or clerk, as agent for a candidate), shall apply to any returning officer or officer appointed by him in pursuance of this Act, and to his partner or clerk.

Miscellaneous.

Prohibi-
tion of dis-
closure of
vote.

XII. No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted.

Non-com-
pliance
with rules.

XIII. No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.

Use of
municipal
ballot
boxes, &c.,
for Parlia-
mentary
election,
and vice
versa.

XIV. Where a parliamentary borough and municipal borough occupy the whole or any part of the same area, any ballot boxes or fittings for polling stations and compartments provided for such parliamentary borough or such municipal borough may be used in any municipal or parliamentary election in such borough free of charge, and any damage other than reasonable wear and tear caused to the same shall be paid as part of the expenses of the election at which they are so used.

Construc-
tion of
Act.

XV. This part of this Act shall, so far as is consistent with the tenor thereof, be construed as one with the enactments for the time being in force relating to the representation of the people, and to the registration of persons entitled to vote at the election of members to serve in Parliament, and with any enactments otherwise relating to the subject matter of this part of this Act, and terms used in this part of this Act shall have the same meaning as in the said enactments; and in construing the said enactments relating to an election or to the poll or taking the votes by poll, the mode of election and of taking the poll established by this Act shall for the purposes of the said enactments be deemed to be substituted for the mode of election or poll, or taking the votes by poll, referred to

in the said enactments; and any person applying for a ballot paper under this Act shall be deemed “to tender his vote” or “to assume to vote,” within the meaning of the said enactments; and any application for a ballot paper under this Act, or expressions relative thereto, shall be equivalent to “voting” in the said enactments and any expressions relative thereto;¹ and the term “polling booth” as used in the said enactments shall be deemed to include a polling station; and the term “proclamation” as used in the said enactments shall be deemed to include a public notice given in pursuance of this Act.

Application of Part of Act to Scotland.

XVI. This part of this Act shall apply to Scotland, subject to the following provisions:—

- (1.) The expression “crime and offence” shall be equivalent to the expression “misdemeanour,” and shall be substituted therefor:
- (2.) All offences under this Act for which any person may be punished on summary conviction shall be prosecuted before the sheriff under the provisions of “The Summary Procedure Act, 1864;” and all jurisdictions, powers, and authorities necessary for that purpose are hereby conferred on sheriffs:
- (3.) The expression “sheriff” shall include sheriff-substitute:
- (4.) The provisions of this Act relating to the division of counties and boroughs into polling districts shall not apply to Scotland:
- (5.) The ballot boxes, ballot papers, stamping instruments, and other requisites for a parliamentary election shall be provided and paid for in the same manner as polling-rooms or booths under the fortieth section of the Act of the second and third years of the reign of King William the Fourth, chapter sixty-five, intituled “An Act to amend the Representation of the People in Scotland;” and the reasonable remuneration of presiding officers, assistants, and clerks employed by the returning officer at such an election, and all other expenses properly incurred by the returning officer, and by sheriff clerks and town clerks in carrying into

Alterations for application of Part I. to Scotland.

¹ See note 1 to section 9 of the Act 3 and 4 Will. IV., c. 76.

effect the provisions of this Act, shall be paid by the candidates: provided always, that if any person shall be proposed as a candidate without his consent, the person so proposing him shall be liable to defray his share of all those expenses in like manner as if he had been a candidate himself; provided also, that the fee to be paid to each presiding officer shall in no case exceed the sum of three guineas per day, and the fee to be paid to each assistant to the returning officer shall not exceed two guineas per day, and the fee to be paid to each clerk shall not exceed one guinea per day.

Sections 17, 18, and 19 provide for "Application of part of Act to Ireland."

PART II.

MUNICIPAL ELECTIONS.

Applica-
tion to
municipal
election of
enact-
ments re-
lating to
the poll at
parliamen-
tary elec-
tions.

XX. The poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election: Provided as follows:

- (1.) The term "returning officer" shall mean the mayor or other officer who, under the law relating to municipal elections, presides at such elections:
- (2.) The term "petition questioning the election or return" shall mean any proceeding in which a municipal election can be questioned:
- (3.) The mayor¹ shall provide everything which in the case of a parliamentary election is required to be provided by the returning officer for the purpose of a poll:
- (4.) All expenses shall be defrayed in manner provided by law with respect to the expenses of a municipal election:
- (5.) No return shall be made to the Clerk of the Crown in Chancery:

¹ See section 22, sub-section (1.)

- (6.) Nothing in this Act shall be deemed to authorise the appointment of any agents of a candidate in a municipal election, but if in the case of a municipal election any agent of a candidate is appointed, and a notice in writing of such appointment is given to the returning officer, the provisions of this Act with respect to agents of candidates shall, so far as respects such agent, apply in the case of that election:
- (7.) The provisions of this Act with respect to—
- (a.) The voting of a returning officer; and
 - (b.) The use of a room for taking a poll; and
 - (c.) The right to vote of persons whose names are on the register of voters;
- shall not apply in the case of a municipal election.

A municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed.¹

XXI. Assessors shall not be elected in any ward of any municipal borough, and a municipal election need not be held before the assessors or their deputies, but may be held before the mayor, alderman, or other returning officer only.

Abolition
of ward
assessors.

Application of Part of Act to Scotland.

XXII. This part of this Act shall apply to Scotland, subject to the following provisions:—

Alterations for
application of
Part II. to
Scotland.

- (1.) The term “mayor” shall mean the provost or other chief magistrate of a municipal borough, as defined by this Act:²
- (2.) All municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in Schedule C. to the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy-six, intituled “An Act to alter and amend the laws for the election of the Magistrates and Councillors of the Royal Burghs in Scotland,” are directed

¹ See section 22, sub-section (2.)

² See section 20, sub-section (3.)

effect the provisions of ¹ force at the time
 the candidates: prov^d as amended by this
 person shall be prop^d all apply to such elec-
 his consent, the pe-
 liable to defray ¹
 like manner as ^{of part of Act to Ireland."}

self; provid^d PART III.
 each presi^t

sum^d of ¹ PERSONATION.

paid ¹
 shall
 for following enactments shall be made with
 personation at parliamentary and municipal

Section shall for all purposes of the laws relating to
 parliamentary and municipal elections be deemed to be
 the offence of personation who at an election for
 county or borough, or at a municipal election, applies
 for a ballot paper in the name of some other person,
 whether that name be that of a person living or dead, or
 of a fictitious person, or who having voted once at any such
 election applies at the same election for a ballot paper in
 his own name.

*App^d
 the
 m.*
 The offence of personation, or of aiding, abetting, coun-
 selling, or procuring the commission of the offence of
 personation by any person, shall be a felony, and any person
 convicted thereof shall be punished by imprisonment for
 a term not exceeding two years together with hard labour.
 It shall be the duty of the returning officer to institute a
 prosecution against any person whom he may believe to
 have been guilty of personation, or of aiding, abetting,
 counselling, or procuring the commission of the offence of
 personation by any person, at the election for which he is
 returning officer, and the costs and expenses of the pro-
 secutor and the witnesses in such case, together with
 compensation for their trouble and loss of time, shall be
 allowed by the court in the same manner in which courts
 are empowered to allow the same in cases of felony.

The provisions of the Registration Acts, specified in the
 Third Schedule to this Act, shall in England and Ireland
 respectively apply to personation under this Act in the
 same manner as they apply to a person who knowingly
 personates and falsely assumes to vote in the name of
 another person as mentioned in the said Acts.

See the last paragraph of section 20.

of personation shall be deemed to be a cor-
within the meaning of the Parliamentary
368.

al of any election petition questioning the
return for any county or borough, any candi-
found by the report of the judge by himself or his
ats to have been guilty of personation, or by himself
or his agents to have aided, abetted, counselled, or pro-
cured the commission at such election of the offence of
personation by any person, such candidate shall be in-
capable of being elected or sitting in Parliament for such
county or borough during the Parliament then in exist-
ence.¹

XXV. Where a candidate, on the trial of an election petition claiming the seat for any person, is proved to have been guilty, by himself or by any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election, or where any person retained or employed for reward by or on behalf of such candidate for all or any of the purposes of such election, as agent, clerk, messenger, or in any other employment, is proved on such trial to have voted at such election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election and is proved to have been so bribed, treated, or unduly influenced, or so retained or employed for reward as aforesaid.

Vote to be
struck off
for bribery,
treating, or
undue
influence.

XXVI. This part of this Act shall apply to Scotland, subject to the following provision :—

Alterations
in Act as
applying
to Scotland.

The offence of personation shall be deemed to be a crime and offence, and the rules of the law of Scotland with respect to apprehension, detention, pre-cognition, commitment, and bail shall apply thereto, and any person accused thereof may be brought to trial in the court of justiciary, whether in Edinburgh or on circuit, at the instance of the Lord Advocate, or before the sheriff court, at the instance of the procurator fiscal.

XXVII. This part of this Act, so far as regards parlia-

¹ See rule 27, schedule First.

to be conducted by the Acts in force at the time of the passing of this Act as amended by this Act; and all such Acts shall apply to such elections accordingly.¹

Section 23 provides for "Application of part of Act to Ireland."

PART III.

PERSONATION.

Definition
and pun-
ishment of
person-
ation.

XXIV. The following enactments shall be made with respect to personation at parliamentary and municipal elections:—

A person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election applies at the same election for a ballot paper in his own name.

The offence of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, shall be a felony, and any person convicted thereof shall be punished by imprisonment for a term not exceeding two years together with hard labour. It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, at the election for which he is returning officer, and the costs and expenses of the prosecutor and the witnesses in such case, together with compensation for their trouble and loss of time, shall be allowed by the court in the same manner in which courts are empowered to allow the same in cases of felony.

The provisions of the Registration Acts, specified in the Third Schedule to this Act, shall in England and Ireland respectively apply to personation under this Act in the same manner as they apply to a person who knowingly personates and falsely assumes to vote in the name of another person as mentioned in the said Acts.

See the last paragraph of section 20.

The offence of personation shall be deemed to be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868.

If, on the trial of any election petition questioning the election or return for any county or borough, any candidate is found by the report of the judge by himself or his agents to have been guilty of personation, or by himself or his agents to have aided, abetted, counselled, or procured the commission at such election of the offence of personation by any person, such candidate shall be incapable of being elected or sitting in Parliament for such county or borough during the Parliament then in existence.¹

XXV. Where a candidate, on the trial of an election petition claiming the seat for any person, is proved to have been guilty, by himself or by any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election, or where any person retained or employed for reward by or on behalf of such candidate for all or any of the purposes of such election, as agent, clerk, messenger, or in any other employment, is proved on such trial to have voted at such election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election and is proved to have been so bribed, treated, or unduly influenced, or so retained or employed for reward as aforesaid.

Vote to be struck off for bribery, treating, or undue influence.

XXVI. This part of this Act shall apply to Scotland, subject to the following provision :—

Alterations in Act as applying to Scotland.

The offence of personation shall be deemed to be a crime and offence, and the rules of the law of Scotland with respect to apprehension, detention, precognition, commitment, and bail shall apply thereto, and any person accused thereof may be brought to trial in the court of justiciary, whether in Edinburgh or on circuit, at the instance of the Lord Advocate, or before the sheriff court, at the instance of the procurator fiscal.

XXVII. This part of this Act, so far as regards parlia-

¹ See rule 27, schedule First.

Construc-
tion of
part of
Act.

mentary elections, shall be construed as one with "The Parliamentary Elections Act, 1868," and shall apply to an election for a university or combination of universities.

PART IV.

MISCELLANEOUS.

Effect of
Schedules.

XXVIII. The schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act.

Defini-
tions.

"Municipal
borough ;"
"Municipal
Corporation
Acts."

XXIX. In this Act—

The expression "municipal borough" means any place for the time being subject to the Municipal Corporation Acts, or any of them :

The expression "Municipal Corporation Acts" means—

(b.) As regards Scotland, the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy-six, intituled "An Act to alter and amend the laws for "the election of Magistrates and Councillors of "the Royal Burghs in Scotland," and the Act of the same session, chapter seventy-seven, intituled "An Act to provide for the appointment "and election of Magistrates and Councillors "for the several Burghs and Towns of Scotland "which now return or contribute to return Mem- "bers to Parliament, and are not Royal Burghs," and the Act of the session of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter thirty-three, intituled "An Act to make more effectual provision for "regulating the Police of Towns and populous "Places in Scotland, and for paving, draining, "cleansing, lighting, and improving the same ;" and "The General Police and Improvement (Scotland) Act, 1862," and any Acts amending the same :

The expression "municipal election" means—

(b.) As regards Scotland, an election of any person to “Municipal election.”
serve the office of councillor or commissioner of
any municipal borough, or of a ward or district of
any municipal borough.

XXX. This Act shall apply to any parliamentary or municipal election which may be held after the passing thereof. *Application of Act.*

XXXI. Nothing in this Act, except Part III. thereof, shall apply to any election for a university or combination of universities. *Saving.*

Repeal.

XXXII. The Acts specified in the fourth, fifth, and sixth schedules to this Act, to the extent specified in the third column of those schedules, and all other enactments inconsistent with this Act, are hereby repealed. *Repeal of Acts in schedules.*

Provided that this repeal shall not affect—

- (a.) Anything duly done or suffered under any enactment hereby repealed; or
- (b.) Any right or liability acquired, accrued, or incurred under any enactment hereby repealed; or
- (c.) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; or
- (d.) Any investigation, legal proceeding, or remedy in respect of any such right, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not passed.

XXXIII. This Act may be cited as The Ballot Act, 1872, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty, and no longer, unless Parliament shall otherwise determine; and on the said day the Acts in the fourth, fifth, and sixth schedules shall be thereupon revived; provided that such revival shall not affect any act done, any rights acquired, any liability or penalty incurred, or any proceeding pending under this Act, but such proceeding shall be carried on as if this Act had continued in force. *Short title.*

S C H E D U L E S.

FIRST SCHEDULE.

PART I.

RULES FOR PARLIAMENTARY ELECTIONS.

Election.

I. The returning officer shall, in the case of a county election, within two days after the day on which he receives the writ, and in the case of a borough election, on the day on which he receives the writ or the following day, give public notice, between the hours of nine in the morning and four in the afternoon, of the day on which and the place at which he will proceed to an election, and of the time appointed for the election, and of the day on which the poll will be taken in case the election is contested, and of the time and place at which forms of nomination papers may be obtained, and in the case of a county election shall send one of such notices by post, under cover, to the postmaster of the principal post office of each polling place in the county, endorsed with the words "Notice of election," and the same shall be forwarded free of charge; and the postmaster receiving the same shall forthwith publish the same in the manner in which post office notices are usually published.¹

II. The day of election shall be fixed by the returning officer as follows; that is to say, in the case of an election for a county or a district borough not later than the ninth day after the day on which he receives the writ, with an interval of not less than three clear days between the day on which he gives the notice and the day of election; and in the case of an election for any borough other than a district borough not later than the fourth day after the day on which he receives the writ, with an interval of not less than two clear days between the day on which he gives the notice and the day of election.²

III. The place of election shall be a convenient room situate in the town in which such election would have

¹ See rule 61 of this schedule.

² See rule 61 of this schedule.

been held if this Act had not passed, or where the election would not have been held in a town, then situate in such town in the county as the returning officer may from time to time determine as being in his opinion most convenient for the electors.¹

IV. The time appointed for the election shall be such two hours between the hours of ten in the forenoon and three in the afternoon as may be appointed by the returning officer, and the returning officer shall attend during those two hours and for one hour after.

V. Each candidate shall be nominated by a separate nomination paper, but the same electors or any of them may subscribe as many nomination papers as there are vacancies to be filled, but no more.

VI. Each candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate; the description shall include his names, his abode, and his rank, profession, or calling, and his surname shall come first in the list of his names. No objection to a nomination paper on the ground of the description of the candidate therein being insufficient, or not being in compliance with this rule, shall be allowed or deemed valid, unless such objection is made by the returning officer, or by some other person, at or immediately after the time of the delivery of the nomination paper.

VII. The returning officer shall supply a form of nomination paper to any registered elector requiring the same during such two hours as the returning officer may fix, between the hours of ten in the morning and two in the afternoon on each day intervening between the day on which notice of the election was given and the day of election, and during the time appointed for the election; but nothing in this Act shall render obligatory the use of a nomination paper supplied by the returning officer, so, however, that the paper be in the form prescribed by this Act.

VIII. The nomination papers shall be delivered to the returning officer at the place of election during the time appointed for the election; and the candidate nominated by each nomination paper, and his proposer and seconder,

¹ See rule 58 of this schedule.

and one other person selected by the candidate, and no person other than aforesaid, shall, except for the purpose of assisting the returning officer, be entitled to attend the proceedings during the time appointed for the election.

IX. If the election is contested the returning officer shall, as soon as practicable after adjourning the election, give public notice of the day on which the poll will be taken, and of the candidates described as in their respective nomination papers, and of the names of the persons who subscribe the nomination paper of each candidate, and of the order in which the names of the candidates will be printed in the ballot paper, and, in the case of an election for a county, deliver to the postmaster of the principal post office of the town in which is situate the place of election a paper, signed by himself, containing the names of the candidates nominated, and stating the day on which the poll is to be taken, and the postmaster shall forward the information contained in such paper by telegraph, free of charge, to the several postal telegraph offices situate in the county for which the election is to be held, and such information shall be published forthwith at each such office in the manner in which post office notices are usually published.

X. If any candidate nominated during the time appointed for the election is withdrawn in pursuance of this Act, the returning officer shall give public notice of the name of such candidate, and the names of the persons who subscribed the nomination paper of such candidate, as well as of the candidates who stood nominated or were elected.

XI. The returning officer shall, on the nomination paper being delivered to him, forthwith publish notice of the name of the person nominated as a candidate, and of the names of his proposer and seconder, by placarding or causing to be placarded the names of the candidate and his proposer and seconder in a conspicuous position outside the building in which the room is situate appointed for the election.

XII. A person shall not be entitled to have his name inserted in any ballot paper as a candidate unless he has been nominated in manner provided by this Act, and every person whose nomination paper has been delivered to the returning officer during the time appointed for the elec-

tion shall be deemed to have been nominated in manner provided by this Act, unless objection be made to his nomination paper by the returning officer or some other person before the expiration of the time appointed for the election or within one hour afterwards.

XIII. The returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final; but if allowing the same, shall be subject to reversal on petition questioning the election or return.

Note.—The thirteen preceding rules do not apply to the nomination of candidates in municipal elections in Scotland. See note to section 1.

The Poll.

XIV. The poll shall take place on such day as the returning officer may appoint, not being in the case of an election for a county or a district borough less than two nor more than six clear days, and not being in the case of an election for a borough other than a district borough more than three clear days after the day fixed for the election.¹

By rule 64 of this schedule, sub-section (C.), it is declared that nothing in this schedule with respect to the day of the poll shall apply to a municipal election.

XV. At every polling place the returning officer shall provide a sufficient number of polling stations for the accommodation of the electors entitled to vote at such polling place, and shall distribute the polling stations amongst those electors in such manner as he thinks most convenient, provided that in a district borough there shall be at least one polling station at each contributory place of such borough.¹

XVI. Each polling station shall be furnished with such number of compartments, in which the voters can mark their votes screened from observation, as the returning officer thinks necessary, so that at least one compartment be provided for every one hundred and fifty electors entitled to vote at such polling station.²

XVII. A separate room or separate booth may contain

¹ See section 8, and note 1 thereto.

² See section 8, and note 1 thereto.

a separate polling station, or several polling stations may be constructed in the same room or booth.¹

XVIII. No person shall be admitted to vote at any polling station except the one allotted to him.

XIX. The returning officer shall give public notice of the situation of polling stations¹ and the description of voters entitled to vote at each station, and of the mode in which electors are to vote.²

XX. The returning officer shall provide each polling station with materials for voters to mark the ballot papers, with instruments for stamping thereon the official mark, and with copies of the register of voters, or such part thereof as contains the names of the voters allotted to vote at such station. He shall keep the official mark secret, and an interval of not less than seven years shall intervene between the use of the same official mark at elections for the same county or borough.³

XXI. The returning officer shall appoint a presiding officer to preside at each station,⁴ and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty.

XXII. Every ballot paper shall contain a list of the candidates described as in their respective nomination papers, and arranged alphabetically in the order of their surnames, and (if there are two or more candidates with the same surname) of their other names : it shall be in the form set forth in the Second Schedule to this Act or as near thereto as circumstances admit, and shall be capable of being folded up.⁵

XXIII. Every ballot box shall be so constructed that

¹ See section 8, and note 1 thereto.

² Under sections 8 and 29 of the Act 3 and 4 Will. IV. c. 76, intimation of the situation of the polling places for municipal elections must be made by the town clerk ten days at least before the day of election, and before it is known whether there is to be a contest or not. This duty must still be performed by the town clerk.

³ See section 8.

⁴ See section 8 and note to rule 31 of this schedule.

⁵ See section 8.

the ballot papers can be introduced therein, but cannot be withdrawn therefrom, without the box being unlocked.¹ The presiding officer at any polling station, just before the commencement of the poll, shall show the ballot box empty to such persons, if any, as may be present in such station, so that they may see that it is empty, and shall then lock it up, and place his seal upon it in such manner as to prevent its being opened without breaking such seal, and shall place it in his view for the receipt of ballot papers, and keep it so locked and sealed.¹

XXIV. Immediately before a ballot paper is delivered to an elector, it shall be marked on both sides with the official mark, either stamped or perforated, and the number, name, and description of the elector as stated in the copy of the register shall be called out, and the number of such elector shall be marked on the counter-foil, and a mark shall be placed in the register against the number of the elector, to denote that he has received a ballot paper, but without showing the particular ballot paper which he has received.²

XXV. The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there mark his paper, and fold it up so as to conceal his vote, and shall then put his ballot paper, so folded up, into the ballot box; he shall vote without undue delay, and shall quit the polling station as soon as he has put his ballot paper into the ballot box.³

XXVI. The presiding officer, on the application of any voter who is incapacitated by blindness or other physical cause from voting in manner prescribed by this Act, or (if the poll be taken on Saturday) of any voter who declares that he is of the Jewish persuasion, and objects on religious grounds to vote in manner prescribed by this Act, or of any voter who makes such a declaration as herein-after mentioned that he is unable to read, shall, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot paper in manner directed by such voter, and the ballot paper to be placed in the ballot box, and the name and number on the register of voters of every voter whose vote is marked in pursuance of this rule, and the reason why it is so

¹ See section 8.

² See section 2.

³ See section 2.

marked, shall be entered on a list, in this Act called "the list of votes marked by the presiding officer."¹

The said declaration, in this Act referred to as "the declaration of inability to read,"² shall be made by the voter at the time of polling, before the presiding officer, who shall attest it in the form herein-after mentioned, and no fee, stamp, or other payment shall be charged in respect of such declaration, and the said declaration shall be given to the presiding officer at the time of voting.

XXVII. If a person, representing himself to be a particular elector named on the register, applies for a ballot paper after another person has voted as such elector, the applicant shall, upon duly answering the questions and taking the oath permitted by law to be asked of and to be administered to voters at the time of polling, be entitled to mark a ballot paper in the same manner as any other voter, but the ballot paper (in this Act called a tendered ballot paper) shall be of a colour differing from the other ballot papers, and, instead of being put into the ballot box, shall be given to the presiding officer and endorsed by him with the name of the voter and his number in the register of voters, and set aside in a separate packet, and shall not be counted by the returning officer. And the name of the voter and his number on the register shall be entered on a list, in this Act called "the tendered votes list."³

XXVIII. A voter who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper, may, on delivering to the presiding officer the ballot paper so inadvertently dealt with, and proving the fact of the inadvertence to the satisfaction of the presiding officer, obtain another ballot paper in the place of the ballot paper so delivered up (in this Act called a spoilt ballot paper), and the spoilt ballot paper shall be immediately cancelled.

XXIX. The presiding officer of each station, as soon as practicable after the close of the poll, shall, in the presence of the agents of the candidates, make up into separate packets sealed with his own seal and the seals of

¹ See Form of List, Appendix XVI., No. 18.

² See Form of Declaration, Appendix XVI., No. 16.

³ See sections 24 and 26, and Form of List, Appendix XVI., No. 17.

such agents of the candidates as desire to affix their seals,—

- (1.) Each ballot box in use at his station, unopened but with the key attached; and
- (2.) The unused and spoilt ballot papers, placed together; and
- (3.) The tendered ballot papers; and
- (4.) The marked copies of the register of voters; and the counterfoils of the ballot papers; and
- (5.) The tendered votes list, and the lists of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer under the heads “physical incapacity,” “Jews,” and “unable to read;”¹ and “the declarations of inability to read,”

and shall deliver such packets to the returning officer.²

XXX. The packets shall be accompanied by a statement made by such presiding officer, showing the number of ballot papers entrusted to him, and accounting for them under the heads of ballot papers in the ballot box, unused, spoilt, and tendered ballot papers, which statement is in this Act referred to as the ballot paper account.³

Counting Votes.

XXXI. The candidates may respectively appoint agents⁴ to attend the counting of the votes.

XXXII. The returning officer shall make arrangements for counting the votes in the presence of the agents of the candidates as soon as practicable after the close of the poll, and shall give to the agents of the candidates appointed to attend at the counting of the votes notice in writing of the time and place at which he will begin to count the same.⁵

XXXIII. The returning officer, his assistants and clerks, and the agents of the candidates, and no other person,

¹ See Form of Statement, Appendix XVI., No. 19.

² See section 2.

³ See Form of Account, Appendix XVI., No. 20.

⁴ See sub-section (6) of section 20. See also section 4 and rule 54 of this schedule.

⁵ See section 2. See also note 2 to section 10 of the Act 3 & 4 Will. IV. c. 76.

except with the sanction of the returning officer, may be present at the counting of the votes.¹

XXXIV. Before the returning officer proceeds to count the votes, he shall, in the presence of the agents of the candidates, open each ballot box, and, taking out the papers therein, shall count and record the number thereof, and then mix together the whole of the ballot papers contained in the ballot boxes. The returning officer, while counting and recording the number of ballot papers and counting the votes, shall keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers.²

XXXV. The returning officer shall, so far as practicable, proceed continuously with counting the votes, allowing only time for refreshment, and excluding (except so far as he and the agents otherwise agree) the hours between seven o'clock at night and nine o'clock on the succeeding morning. During the excluded time the returning officer shall place the ballot papers and other documents relating to the election under his own seal and the seals of such of the agents of the candidates as desire to affix their seals, and shall otherwise take proper precautions for the security of such papers and documents.³

XXXVI. The returning officer shall endorse "rejected" on any ballot paper which he may reject as invalid, and shall add to the endorsement "rejection objected to," if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery⁴ the number of ballot papers rejected and not counted by him under the several heads of—

1. Want of official mark ;
2. Voting for more candidates than entitled to ;
3. Writing or mark by which voter could be identified ;
4. Unmarked or void for uncertainty ;⁵

and shall on request allow any agents of the candidates, before such report is sent, to copy it.

XXXVII. Upon the completion of the counting, the returning officer shall seal up in separate packets the

¹ See section 2.

² See section 2.

³ See section 2.

⁴ See sub-section (5) of section 20, and sub-section (b) of rule 64 of this schedule.

⁵ See section 2.

counted and rejected ballot papers. He shall not open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils, but shall proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding officer by comparing it with the number of ballot papers recorded by him as aforesaid, and the unused and spoilt ballot papers in his possession and the tendered votes list, and shall reseal each sealed packet after examination. The returning officer shall report to the Clerk of the Crown in Chancery the result of such verification,¹ and shall, on request, allow any agents of the candidates, before such report is sent, to copy it.²

XXXVIII. Lastly, the returning officer shall forward to the Clerk of the Crown in Chancery³ (in manner in which the poll books are by any existing enactment required to be forwarded to such Clerk, or as near thereto as circumstances admit) all the packets of ballot papers in his possession, together with the said reports, the ballot paper accounts, tendered votes lists, lists of votes marked by the presiding officer, statements relating thereto, declarations of inability to read, and packets of counterfoils, and marked copies of registers, sent by each presiding officer, endorsing on each packet a description of its contents and the date of the election to which they relate, and the name of the county or borough for which such election was held; and the term poll book in any such enactment shall be construed to include any document forwarded in pursuance of this rule.

XXXIX. The Clerk of the Crown⁴ shall retain for a year all documents relating to an election forwarded to him in pursuance of this Act by a returning officer, and then, unless otherwise directed by an order of the House of Commons, or of one of Her Majesty's Superior Courts, shall cause them to be destroyed.

XL. No person shall be allowed to inspect any rejected ballot papers in the custody of the Clerk of the Crown in

¹ See sub-section (5) of section 20, and sub-section (b) of rule 64 of this schedule.

² See section 2.

See sub-section (5) of section 20, and sub-section (b) of rule 64 of this schedule.

⁴ See sub-section (5) of section 20, and sub-section (b) of rule 64 of this schedule.

Chancery, except under the order of the House of Commons or under the order of one of Her Majesty's Superior Courts, to be granted by such court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return; and any such order for the inspection or production of ballot papers may be made subject to such conditions as to persons, time, place, and mode of inspection or production as the House or court making the same may think expedient, and shall be obeyed by the Clerk of the Crown in Chancery. Any power given to a court by this rule may be exercised by any judge of such court at chambers.¹

XLI. No person shall, except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the Clerk of the Crown in Chancery; such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient; provided that on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid.

XLII. All documents forwarded by a returning officer in pursuance of this Act to the Clerk of the Crown in Chancery, other than ballot papers and counterfoils, shall be open to public inspection at such time and under such regulations as may be prescribed by the Clerk of the Crown in Chancery, with the consent of the Speaker of the House of Commons, and the Clerk of the Crown shall supply copies of or extracts from the said documents to any person demanding the same, on payment of such fees and subject to such regulations as may be sanctioned by the Treasury.³

¹ See sub-section (b) of rule 64 of this schedule.

² See sub-section (b) of rule 64 of this schedule.

³ See sub-section (b) of rule 64 of this schedule.

XLIII. Where an order is made for the production by the Clerk of the Crown in Chancery of any document in his possession relating to any specified election, the production by such clerk or his agent of the document ordered, in such manner as may be directed by such order, or by a rule of the court having power to make such order, shall be conclusive evidence that such document relates to the specified election; and any endorsement appearing on any packet of ballot papers produced by such Clerk of the Crown or his agent shall be evidence of such papers being what they are stated to be by the endorsement. The production from proper custody of a ballot paper purporting to have been used at any election, and of a counterfoil marked with the same printed number and having a number marked thereon in writing, shall be *prima facie* evidence that the person who voted by such ballot paper was the person who at the time of such election had affixed to his name in the register of voters at such election the same number as the number written on such counterfoil.¹

General Provisions.

XLIV. The return of a member or members elected to serve in Parliament for any county or borough shall be made by a certificate of the names of such member or members under the hand of the returning officer endorsed on the writ of election for such county or borough, and such certificate shall have effect and be dealt with in like manner as the return under the existing law, and the returning officer may, if he think fit, deliver the writ with such certificate endorsed to the postmaster of the principal post office of the place of election, or his deputy, and in that case he shall take a receipt from the postmaster or his deputy for the same; and such postmaster or his deputy shall then forward the same by the first post, free of charge, under cover, to the Clerk of the Crown, with the words "Election Writ and Return" endorsed thereon.

XLV. The returning officer shall, as soon as possible, give public notice of the names of the candidates elected, and, in the case of a contested election, of the total number of votes given for each candidate, whether elected or not.²

¹ See sub-section (b) of rule 64 of this schedule.

² See section 2, and note 2 to section 10 of the Act 3 and 4 Will. IV., cap. 76.

XLVI. Where the returning officer is required or authorised by this Act to give any public notice, he shall carry such requirement into effect by advertisements, placards, handbills, or such other means as he thinks best calculated to afford information to the electors.¹

XLVII. The returning officer may, if he think fit, preside at any polling station, and the provisions of this Act relating to a presiding officer shall apply to such returning officer with the necessary modifications as to things to be done by the returning officer to the presiding officer, or the presiding officer to the returning officer.

XLVIII. In the case of a contested election for any county or borough, the returning officer may, in addition to any clerks, appoint competent persons to assist him in counting the votes.²

XLIX. No person shall be appointed by a returning officer for the purposes of an election who has been employed by any other person in or about the election.

L. The presiding officer may do, by the clerks appointed to assist him, any act which he is required or authorised to do by this Act at a polling station, except ordering the arrest, exclusion, or ejection from the polling station of any person.³

LI. A candidate may himself undertake the duties which any agent of his⁴ if appointed might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may, in pursuance of this Act, attend.

See section 29 of the Act 3 and 4 William IV., c. 76.

² See section 8.

³ See sections 9 and 10.

⁴ See sub-section (6) of section 20. While the Ballot Act imposes secrecy on returning officers, presiding officers, assistants, clerks, and agents, and contains precise enactments for securing it, it contains no similar provisions with reference to candidates themselves. The Solicitor-General and Mr Watson having been consulted as to whether candidates should be required to take the statutory declaration of secrecy as a pre-requisite to being admitted to the poll, expressed the following opinion:—"It appears contrary to the spirit of the act that a candidate should be permitted to undertake these duties without having first made the statutory declaration of secrecy; but in the absence of any words of enactment bearing either directly or indirectly upon the matter, we cannot advise the returning or election officers to undertake the responsibility of excluding candidates who decline to make such declaration." See Memorial and Opinion, Appendix XV.

LII. The name and address of every agent of a candidate appointed to attend the counting of the votes shall be transmitted to the returning officer one clear day at the least before the opening of the poll; and the returning officer may refuse to admit to the place where the votes are counted any agent whose name and address has not been so transmitted, notwithstanding that his appointment may be otherwise valid, and any notice required to be given to an agent by the returning officer may be delivered at or sent by post to such address.¹

LIII. If any person appointed an agent by a candidate for the purposes of attending at the polling station or at the counting of the votes dies, or becomes incapable of acting during the time of the election, the candidate may appoint another agent in his place, and shall forthwith give to the returning officer notice in writing of the name and address of the agent so appointed.

LIV. Every returning officer, and every officer, clerk, or agent authorised to attend at a polling station, or at the counting of the votes, shall, before the opening of the poll, make a statutory declaration of secrecy, in the presence, if he is the returning officer, of a justice of the peace, and if he is any other officer or an agent, of a justice of the peace or of the returning officer; but no such returning officer, officer, clerk, or agent as aforesaid shall, save as aforesaid, be required, as such, to make any declaration or take any oath on the occasion of any election.²

LV. Where in this Act any expressions are used requiring or authorising or inferring that any act or thing is to be done in the presence of the agents of the candidates, such expressions shall be deemed to refer to the presence of such agents of the candidates as may be authorised to attend, and as have in fact attended, at the time and place where such act or thing is being done, and the non-attendance of any agents or agent at such time and place shall not, if such act or thing be otherwise duly done, in anywise invalidate the act or thing done.

LVI. In reckoning time for the purposes of this Act, Sunday, Christmas day, Good Friday, and any day set apart for a public fast or public thanksgiving, shall be excluded; and where anything is required by this Act to

See sub-section (6) of section 20.

² See section 4.

be done on any day which falls on the above-mentioned days, such thing may be done on the next day, unless it is one of the days excluded as above mentioned.

LVII. In this Act—

The expression "district borough" means the borough of Monmouth and any of the boroughs specified in Schedule E to the Act of the session of the second and third years of the reign of King William the Fourth, chapter forty-five, intituled "An Act to amend the Representation of the people in England and Wales;" and

The expression "polling place" means, in the case of a borough, such borough or any part thereof in which a separate booth is required or authorised by law to be provided; and

The expression "agents of the candidates," used in relation to a polling station, means agents appointed in pursuance of section eighty-five of the Act of the session of the sixth and seventh years of the reign of Her present Majesty, chapter eighteen.

Modifications in Application of Part One of Schedule to Scotland.

LVIII. In Scotland, the place of election shall be a convenient room situate in the town in which the writ for the election would, if this Act had not passed, have been proclaimed.

LIX. In Scotland, the candidates may respectively appoint agents to attend at the polling stations.* The ballot papers and other documents other than the return required to be sent to and kept by the Clerk of the Crown in Chancery, shall, in Scotland, be kept by the sheriff clerks of the respective counties in which the returns (including those for burghs) are made, and the provisions of this schedule relating thereto shall be construed as if the sheriff clerk were substituted for Clerk of the Crown in Chancery.

LX. In Scotland, the term "district borough" shall mean the combined burghs and towns specified in Schedule E. of the Act of the session of the second and third years of the reign of King William the Fourth,

* See rule 60 of this schedule.

* See sub-section (6) of section 20.

chapter sixty-five, intituled "An Act to amend the "Representation of the People in Scotland;" and in Schedule A. of the "Representation of the People (Scotland) Act, 1868." 31 and 32.
Vict. c. 48.

LXI. The provisions of the Act of the session of the second and third years of the reign of King William the Fourth, chapter sixty-five, intituled "An Act to amend ' the Representation of the People in Scotland," in so far as they relate to the fixing and announcement of the day of election, the interval to elapse between the receipt of the writ and the day of election, the period of adjournment for taking the poll in the case of Orkney and Shetland, and of the district of burghs comprising Kirkwall, Wick, Dornoch, Dingwall, Tain, and Cromarty, and to the keeping open of the poll for two consecutive days in the case of Orkney and Shetland, shall remain in full force and effect, anything in this Act or any other Act of Parliament now in force notwithstanding; but nothing herein contained shall be construed to exclude Orkney and Shetland or Orkney or Shetland, or the said district of burghs, or any of the burghs in the said district, from any of the benefits and obligations of the other portions of this Act.

Sections 62 and 63 provide for "Modifications in application of Part I. of Schedule to Ireland."

PART II.

RULES FOR MUNICIPAL ELECTIONS.

LXIV. In the application of the provisions of this schedule to municipal elections, the following modifications shall be made:—

- (a.) The expression "register of voters" means the burgess roll of the burgesses of the borough, or, in the case of an election for the ward of a borough, the ward list; and the mayor shall provide true copies of such register for each polling station:—¹
- (b.) All ballot papers and other documents which, in the case of a parliamentary election, are forwarded to the Clerk of the Crown in Chancery, shall be delivered to the town clerk of the municipal borough in which the election is held, and shall be kept by him among the records of the borough;

¹ See section 8.

and the provisions of part one of this schedule with respect to the inspection, production, and destruction of such ballot papers and documents, and to the copies of such documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk, with these modifications; namely,

(a.) An order of the county court having jurisdiction in the borough, or any part thereof, or of any tribunal in which a municipal election is questioned, shall be substituted for an order of the House of Commons, or of one of Her Majesty's Superior Courts; but an appeal from such county court may be had in like manner as in other cases in such county court;

(b.) The regulations for the inspection of documents and the fees for the supply of copies of documents of which copies are directed to be supplied, shall be prescribed by the council of the borough with the consent of one of Her Majesty's Principal Secretaries of State; and, subject as aforesaid, the town clerk, in respect of the custody and destruction of the ballot papers and other documents coming into his possession in pursuance of this Act, shall be subject to the directions of the council of the borough:

(c.) Nothing in this schedule with respect to the day of the poll shall apply to a municipal election.

Modifications in Application of Part II. of Schedule to Scotland.

LXV. In part two of this schedule as applying to Scotland—

The expression "register of voters" means the register, list, or roll of persons entitled to vote in a municipal election made up according to the law for the time being in force.

The expression "county court" means the sheriff court.

The expression "town clerk" includes the clerk appointed by the Commissioners of Police under the Act of the session of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter thirty-three, in-

Section 66 provides for " Modifications in application of Part II. of Schedule to Ireland."

High Sheriff [or Sheriff, or Mayor, or as the case may be].

§ Except in a general election, insert here in the place of A.B., deceased, or otherwise, stating the cause of vacancy.

Certificate endorsed on the Writ.

I hereby certify, that the members [*or member*] elected
for in pursuance of the within-written writ, are [*or is*]
A.B. of in the county of and C.D. of
 in the county of

(Signed) A.B.

High Sheriff [*or Sheriff, or Mayor, or as the case
may be.*]

Note.—A separate writ will be issued for each county as
defined for the purposes of a parliamentary election.

Form of Notice of Parliamentary Election.

The returning officer of the of
will, on the day of now next ensuing,
between the hours of and , proceed to the
nomination, and, if there is no opposition, to the election
of a member [*or members*] for the said county [*or division*
of a county *or borough*] at the*

* *Note,*
Insert de-
scription
of place
and room.

Forms of nomination paper may be obtained at *,
between the hours of and on .

Every nomination paper must be signed by two regis-
tered electors as proposer and seconder, and by eight
other registered electors, as assenting to the nomination.

Every nomination paper must be delivered to the
returning officer by the candidate proposed, or by his
proposer and seconder, between the said hours of
and on the said day of at
the said .*

Each candidate nominated, and his proposer and
seconder, and one other person selected by the candidate,
and no other persons, are entitled to be admitted to the
room.

In the event of the election being contested, the poll
will take place on the day of .

(Signed) A.B.

Sheriff [*or Mayor, as the case may be*]
day of . 18 .

Take notice, that all persons who are guilty of bribery,
treating, undue influence, personation, or other corrupt
practices at the said election will, on conviction of such
offence, be liable to the penalties mentioned in that be-
half in "The Corrupt Practices Prevention Act 1854," and
the Ballot Act, 1872, and the Acts amending the said Acts.

Form of Nomination Paper in Municipal Election.

Note.—The form of nomination paper in a municipal election shall as nearly as circumstances admit be the same as in the case of a parliamentary election.¹

Counter-foil
No.

NOTE:
The counterfoil is to have a number to correspond with that on the back of the Ballot Paper.

Form of Ballot Paper.

Form of Front of Ballot Paper.

1	BROWN (John Brown, of 52 George St., Bristol, Merchant.)	
2	JONES (William David Jones, of High Elms, Wilts, Esq.)	
3	MERTON (Hon. George Travis, commonly called Viscount Merton, of Swanworth, Berks.)	
4	SMITH (Henry Sydney Smith, of 72 High Street, Bath, attorney.)	

Form of Back of Ballot Paper.

No.

Election for county [or borough or ward].

18 .

Note.—The number on the ballot paper is to correspond with that in the counterfoil.

¹ The provisions of this act and the relative form do not apply to the nomination of candidates at municipal elections in Scotland. See note to section 1.

Directions as to printing Ballot Paper.

Nothing is to be printed on the ballot paper except in accordance with this schedule.

The surname of each candidate, and if there are two or more candidates of the same surname, also the other names of such candidates, shall be printed in large characters, as shown in the form, and the names, addresses, and descriptions, and the number on the back of the paper, shall be printed in small characters.

Form of Directions for the Guidance of the Voter in voting, which shall be printed in conspicuous Characters, and placarded outside every Polling Station and in every Compartment of every Polling Station.

The voter may vote for candidate .

The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right-hand side opposite the name of each candidate for whom he votes, thus X

The voter will then fold up the ballot paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, and forthwith quit the polling station.

If the voter inadvertently spoils a ballot paper, he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper.

If the voter votes for more than candidate , or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted.

If the voter takes a ballot paper out of the polling station, or deposits in the ballot box any other paper than the one given him by the officer, he will be guilty of a

FIFTH SCHEDULE.

Acts relating to Scotland.

A description or citation of a portion of an Act is inclusive of the words, section, or other part first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end of the portion comprised in the description or citation.

Session and Chapter.	Title of Act.	Extent of Repeal.
2& 3 Will 4. c. 65.	An Act to amend the representation of the people in Scotland.	Sections twenty-four and twenty - five ; section twenty six ; section twenty-seven from the words "and each substitute so superintending" to the end of that section ; section twenty-eight from the words "and shall within three days" to the end of that section ; section twenty-nine the words " the market cross or " some other convenient " and open place in or " immediately adjoining," and from the words " and if no more " than one candidate " to the end of that section ; section thirty the words " the market " cross or some other " convenient and open " place in or immediately adjoining," and from the words " and " if no more candidates " down to the words " Saturdays and " Sundays," and from the words " and the " Sheriff who proclaim-

Session and Chapter.	Title of Act.	Extent of Repeal.
13 & 14 Vict. c. 33.	An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for paving, draining, cleansing, lighting, and improving the same.	Sections seven to eleven and thirteen to twenty-six, sections twenty-nine and thirty, so far as their provisions are inconsistent with the provisions of this Act, and schedules (A.), (B.), and (C.)
16 & 17 Vict. c. 28.	An Act to amend the law as to taking the poll at elections of members to serve in Parliament for Scotland.	Sections one and ten.
18 & 19 Vict. c. 24.	<i>An Act the title of which begins with the words "An Act to amend an "Act," and ends with the words "in county "elections in that "country."</i>	The whole Act.
24 & 25 Vict. c. 83.	An Act to amend the law regarding the registration of county voters in Scotland.	Schedule (D.) annexed to the Act from the words "and that I am possessed," to the end of the said schedule.
25 & 26 Vict. c. 101.	<i>An Act the title of which begins with the words "An Act to make more "effectual provision for "regulating the police," and ends with the words "and also for promot- "ing the public health "thereof."</i>	Sections forty-six, forty-seven, and fifty, so far as their provisions are inconsistent with the provisions of this Act.
28 & 29 Vict. c. 92.	An Act to shorten the time for the election of members for the Ayr district of Burghs.	The whole Act.

Session and Chapter.	Title of Act.	Extent of Repeal.
31 & 32 Vict. c. 48.	An Act for the amendment of the representation of the people in Scotland.	Section twenty-four from the words "and in the "case of a poll being "demanded" to the words "the said Sheriff "of the county of "Peebles;" and sections forty-four and fifty-four; and section fifty-nine from the words "oath of possession" to the end of that section.
31 & 32 Vict. c. 58.	<i>An Act the title of which begins with the words "An Act to amend the "law of registration," "and ends with the words "other purposes "relating thereto."</i>	Section thirteen.

The Sixth Schedule specifies "Acts relating to Ireland."

APPENDIX No. XIV.

ANNO TERTIO

GEORGE IV. REGIS.

CAP. XCI.

AN ACT FOR REGULATING THE MODE OF ACCOUNTING FOR
THE COMMON GOOD AND REVENUES OF THE ROYAL
BURGHES OF SCOTLAND.—[29th July 1822.]

WHEREAS it is expedient that regular Accounts should be annually stated and exhibited of the Common Good of the Royal Burghs of SCOTLAND, showing the Property and Funds as well as the Incumbrances affecting the same, and the Receipts and Disbursements in every Year; and that Regulations should be made concerning the Sale or Letting of any Part of the Property of the said Royal Burghs, and the granting Securities upon the same; and that Provision should be made for preventing and redressing any Error or Wrong that may be committed in the Administration of the Common Good of the said Burghs, or in collecting the Cess or any local Tax or Imposition within the same: And whereas it is also expedient, where the Management of the Funds of any Charity is exclusively intrusted to the Magistrates and Town Council

of any Burgh, or exclusively to any Number of them, that an Account should be regularly stated and exhibited of the said Funds, and Administration thereof: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act, a particular Account of the Common Good and Revenues of every Royal Burgh of SCOTLAND, made up to the Day preceding the general annual Election of Magistrates in each Burgh, shall be annually stated and deposited in the Manner directed by this Act; which Account shall be so made out as to exhibit a complete State, showing the Common Good of each Burgh, classed under different Heads, specifying as well the Amount of the Debt or Debts owing by each Burgh, as the Property thereof; also the Amount of each Branch of Revenue, distinguishing how much thereof shall have been received, and how much thereof shall be in arrear or remaining unpaid at the Date of such Account; also the Amount of all Sums received, or Loans contracted for, Annuities granted, and Sums received in consideration thereof, or on Sale or Alienation of Property, distinguishing the same from the ordinary Revenue; and also showing every Sum paid, and every Sum remaining unpaid for or by reason of any Expence incurred during the Year for which such Account shall be so made out; distinguishing the fixed or ordinary from the casual or incidental Expenditure, and also showing all cautionary Obligations, positive or conditional, incurred by or on account of such Burgh, distinguishing such as shall have been incurred during the Year; and every such Account shall be certified by the Provost or acting Chief Magistrate of the Burgh for that Year, in Words or to the Effect following:

" I Provost [OR, AS THE CASE MAY BE,
" acting Chief Magistrate, for the Period between the
" Day of and the Day
" of AS THE CASE MAY BE] of the Burgh of
" hereby certify, That this Account con-
" tains a true and complete State of the whole Property
" and Funds belonging to the said Burgh, and of the
" Debts due to and by the Corporation thereof, at this
" Date; and also a true and complete State of the

Account of the Revenues of the Burghs, specifying the Particulars herein mentioned, shall be stated annually.

Account to be certified by the Provost.
Form of Certificate.

“ Revenue and Expenditure of the said Burgh, and of
 “ the cautionary Obligations affecting the same, to the
 “ best of my Knowledge and Belief, during Year
 “ commencing on the and ending on the
 “ Witness my Hand this
 “ Day of in the Year .”

Penalty in
 case of
 Neglect.

II. And be it enacted, That if such annual Account shall not be made out and deposited in the Manner and at the Time herein directed, the Provost, Magistrates, and Members of the Town Council of any Royal Burgh failing or neglecting to make out and deposit such Account, shall severally be subject to a Penalty not exceeding Fifty Pounds each; to be recovered, with Costs of Suit, upon Information to the Court of Exchequer,¹ at the Suit of any Three or more Burgesses of such Burgh; One Half of which Penalty shall go to the Common Good of the said Burgh, and the other Half shall go to the Burgesses suing for the same, or shall be applied to such Purpose as the said Court shall think fit, in whole or in part, as the said Court shall direct.

Inspection
 of Account
 to be
 allowed to
 the Bur-
 gesses.

Complaint
 may be
 made to
 Barons of
 Exchequer.

III. And be it enacted, That every such annual Account shall be deposited in the Office of the Town Clerk of the Burgh to which it appertains, within Three Months after the annual Election of the Magistrates thereof; and such Account shall remain there for Thirty Days after the Expiration of the said Three Months, open to the Inspection of the Burgesses, who may state Objections thereto in Writing, either during that Time or within Two Months after the Expiration of the said Thirty Days, and be entitled to call, in Writing, for the Production of any particular Vouchers; and if upon such Objections being made, the Party or Parties making the same shall not be satisfied with the Explanations which may or shall be thereupon given, it shall and may be lawful for any Three or more Burgesses of such Burgh, within Three Calendar Months after the Expiration of the said Thirty Days, to make Complaint in Writing to the Barons of the Court of Exchequer in SCOTLAND,² who shall proceed to determine the same in a summary Manner, and to make and establish

¹ By section 1 of the Act 19 & 20 Victoria, cap. 56, the Court of Session is constituted the Court of Exchequer in Scotland.

² See note to section 2.

such Rules and Regulations as to the said Barons shall seem meet, for hearing and determining all Matters that may come before them upon such Complaints: Provided always, that no Objection shall be stated in any such Complaint, that had not been previously, during the Time above mentioned, stated in Writing, to the Accounts, unless upon sufficient Cause shown, to the Satisfaction of the said Barons, why such Objection was not then stated.

IV. And be it enacted, That where the Magistrates and Members of the Town Council of any Burgh, or any Number of them, are the sole Trustees for any Charity, Foundation, or Mortification, then and in every such Case, an Account shall be annually stated and certified in the Manner herein-before directed, distinct from the Account relative to the Common Good and Revenues of such Burgh; and such Account relative to such Charity, Foundation, or Mortification, shall be deposited in the Town Clerk's Office as aforesaid, at the same Time that the annual Account relative to the Common Good of the Burgh shall be deposited there, and shall be open to the Inspection of the Burgesses; and if such annual Account relative to such Charity, Foundation, or Mortification, shall not be so stated and deposited, then the Magistrates and Members of the Town Council of such Burgh, or such Number of them as shall be Trustees for such Charity, Foundation, or Mortification, shall severally be subject to a Penalty of Fifty Pounds each, to be recovered and applied as the said Penalty upon any Provost, Magistrates, and Members of the Town Council of any Burgh, neglecting to state and deposit an annual Account the Common Good thereof in the Manner herein directed, may be recovered and applied.

Where Magistrates are Trustees for any Charity, an Account of the Funds thereof shall also be stated annually for Inspection.

Penalty for Neglect.

V. And be it enacted, That the Magistrates and Council of every Royal Burgh shall hereafter cause all Feus, Alienations, or Tacks for more than One Year, of any Heritable Property, being Part of the Common Good of such Burgh, or Tacks of the Common Good, to proceed by Public Roup or Auction, of which Public Notice shall be given by Advertisement, published once at least Twenty Days preceding the Day of Roup or Auction, in some Newspaper printed in such Burgh, if any such Newspaper is there printed, and if no such Newspaper is there printed,

Regulations as to Feus or Alienations.

then in some Newspaper published in the County wherein such Burgh is situated. or if no such Newspaper is published in such County, then in a Newspaper published in the next adjoining County or Counties, in Circulation in such Burgh, and also by written or printed Notices affixed and continued upon at least Three conspicuous Places in the said Burgh, of which the Door of the principal Church shall be one, at least Twenty Days preceding the Day of such Roup or Auction.

In cases of Feus or Alienations, Act of Council to be previously made, and Exchequer Term to intervene.

VI. Provided always, and be it enacted, That no such Notice of Feus or Alienations shall be given, until an Act of the Town Council shall be made, specifying the Particulars thereof; and provided also, that such Notice of Sale as is herein directed in a Newspaper, shall be for the first Time given during an Exchequer Term,¹ and at least Twelve Days before the End of such Term, in order that the Court of Exchequer may grant an Injunction, upon Application made for that Purpose by any Three Burgesses, against the proceeding to make any such Feu or Alienation, if it shall appear proper to the said Court so to do; and which Injunction the said Court is hereby empowered to grant, or otherwise to do in the Matter of any such Application as to the said Court shall seem just.

Collector to specify Purpose of each Head of Collection in every Receipt to be given.

Penalty.

VII. And be it further enacted, That in future every Collector or other Person employed in the Collection or levying of Cess, Stent, or any local Tax or Imposition leviable within any Royal Burgh in SCOTLAND, shall separately and distinctly specify in every Receipt to be given for the same, for what Purpose, by what Authority, and at what Rate, or according to what Rule every such Sum or Imposition is demanded from the Burgesses and Inhabitants of such Burgh, under a Penalty not exceeding Ten Pounds for each Offence; One Half to be paid to the Informer, and the other Half to go to the Common Good of the Burgh; to be recovered with Costs of Suit in the same Way and Manner as any Penalty against any Provost, Magistrates, or Members of the Town Council may be recovered by this Act.

¹ By section 26 of the Act 19 and 20 Victoria, cap. 56, it is enacted as follows, "That part of the winter sitting of the Court of Session which precedes the Christmas recess, and that part of such sittings which follows such recess, and the summer sittings of the Court of Session shall be held to correspond with the terms heretofore observed in the Court of Exchequer."

VIII. And be it enacted, That if any Feus or Alienations, or Leases for more than One Year, of any Part of the Heritable Property, or Tacks of the Common Good of any such Burgh, shall be made otherwise than by Public Roup or Auction, or without such Notice as aforesaid, then the Provost, Magistrates, and Members of the Council of such Burgh, making, authorising, or directing any such Feus, Alienations, Leases, or Tacks, or being otherwise instrumental therein, shall severally forfeit a Sum not exceeding Fifty Pounds each; to be recovered and applied as the said Penalty upon any Provost, Magistrates, or Members of the Town Council of any Burgh, neglecting to state and deposit an annual Account of the Common Good thereof, in the Manner herein directed, may be recovered and applied; and it is hereby declared, that all such Feus, Alienations, Leases, or Tacks, made otherwise than by Public Roup as before directed, shall be altogether void and null, save and except in the Case herein-before provided.

Penalty in the Event of Feus or Alienations being made otherwise than by Public Auction.

IX. And be it further enacted, That in all Cases in which a Complaint is allowed to be made to the Court of Exchequer¹ under this Act, it shall and may be lawful for the said Court to find and adjudge either the Party or Parties complaining or complained of liable in Costs.

Provisions as to Costs.

X. And be it further enacted, That in the Event of no Complaint being made to any annual Account within the Time herein limited, it shall not be competent thereafter to complain to such Court in regard to such Account.

No Complaint to be made after a limited Time.

XI. And be it further enacted, That it shall not be lawful for the Magistrates or the Town Council of any Burgh, to contract any Debt, grant any Obligation, make any Agreement, or enter into any Engagement, which shall have the Effect of binding them or their Successors in Office, unless an Act of Council shall have been previously made in that behalf; and any such Contract, Obligation, Agreement, or Engagement, made or entered into without such Act of Council, shall be void and null as against the Common Good of the Burgh, or the succeeding Magistrates or Town Council thereof, without prejudice, nevertheless, to the personal Liability and Responsibility of the Persons by whom the same may have been made or entered into.

No Debt to be contracted, &c. without a previous Act of Council.

¹ See note to section 2.

Penalties
and Ex-
pences not
to be paid
from the
Common
Good.

Recog-
nizance to
be entered
into to pay
Costs.

XII. And be it further enacted, That any Penalties and Expences, in which any Magistrates or Members of the Town Council of any Royal Burgh may be personally subjected by virtue of this Act, or any Part thereof, shall on no account be paid from or taken out of the Common Good or Revenue of such Burgh: Provided always, that the Parties making any Complaint, or bringing any Information under this Act, shall within Eight Days after the same shall be made or brought as aforesaid, enter into a Recognizance to pay Costs of Suits in case the same shall be awarded.

APPENDIX No. XIV^A.

ANNO TRICESIMO NONO

VICTORIÆ REGINÆ.

CAP. XII.

AN ACT TO ASSIMILATE THE LAW OF SCOTLAND TO THAT
OF ENGLAND RESPECTING THE CREATION OF BUR-
GESSES.—[1st June 1876.]

WHEREAS an Act was passed in the fifth and sixth
year of His Majesty William the Fourth, chapter
seventy-six, intituled “An Act to provide for the regu-
lation of Municipal Corporations in England and
Wales:”

And whereas another Act was passed in the thirty-
second and thirty-third year of Her Majesty, chapter
fifty-five, amending the same:

And whereas it is expedient to assimilate the law of
Scotland in some respects to the law of England as
regards the creation of burgesses:

Be it therefore enacted by the Queen’s most Excellent
Majesty, by and with the advice and consent of the
Lords Spiritual and Temporal, and Commons, in this
present Parliament assembled, and by the authority of
the same:

I. Every person in Scotland of full age, liable to be
rated for the relief of the poor, who at the term of
Whitsunday one thousand eight hundred and seventy-
six, or any succeeding term of Whitsunday in any year,
shall have occupied any house, warehouse, counting-
house, shop, or other building within any burgh in which

Qualifica-
tion of
burgesses.

there are burgesses, during the whole of that year, and the whole of the two preceding years, and who, during the time of such occupation, shall have been an inhabitant householder within the said burgh, and who shall have been rated in respect of such premises so occupied within the burgh to all rates made for the relief of the poor of the parish wherein such premises are situated during the time of his occupation as aforesaid, and who shall have paid, on or before the last term of Whitsunday as aforesaid, all such rates, together with all burgh rates, if any, as shall have become payable in respect of the said premises, except such as shall have become payable within six calendar months next before the said last term of Whitsunday, shall be, subject to the conditions hereinafter contained, a burgess of such burgh, so long as such person shall occupy premises, and be rated and pay rates in manner aforesaid within the same: Provided that the premises in respect of the occupation of which any person shall have been so rated need not be the same premises or in the same parish, but may be different premises in the same parish or different parishes: Provided also, that no person being an alien, and no person who, within twelve calendar months next before the last term of Whitsunday, shall have received parochial relief, or any pension or charitable allowance from the town council revenues of such burgh, or from any corporate body within the same, shall by virtue of this Act be held to be a burgess of such burgh so long as he continues to receive such pension or charitable allowance: Provided further, that no person shall be disqualified from being a burgess as aforesaid by reason that any child of such person shall have been admitted and taught within any endowed school.

Saving.

II. Nothing herein contained shall interfere with any law or legal usage by which burgesses are now created or admitted in any burgh, or give or imply any right or title to or interest in any merchants house or trades house, or any patrimonial lands, common or other properties, funds, or revenues of any of the guilds, burgesses of guild, crafts, or incorporations of the burgh, or to or in any burgess acres, or any grazing rights connected therewith, or any mortifications or benefactions

for behoof of the members of such guilds, burgesses of guild, crafts, or incorporations, or of their families, or any right of management thereof, or any membership in any of the said guilds, burgesses of guild, crafts, or incorporations, or of such burgess acres: Provided that the widows and children of burgesses admitted under this Act, and who may die during the period of their burgess-ship, shall have and enjoy all the rights and privileges which the widows and children of simple burgesses created or admitted in any other manner now enjoy by the law and practice of Scotland.

III. Whereas the effect of this Act may be to reduce the produce of the petty customs or duties leviable in any burgh: Be it enacted, that in the event of the magistrates and council of such burgh resolving in terms of the Act passed in the thirty-third and thirty-fourth years of the reign of Her Majesty, chapter forty-two, to abolish such petty customs and duties and in lieu thereof to levy, by way of assessment, a rate or rates not exceeding the rate or rates mentioned in the said Act, calculated to yield in the whole in the year an amount equal to the nett yearly amount of such petty customs, it shall be lawful to calculate such nett yearly amount with reference to the produce of the petty customs or duties levied in such burgh in the year ending Whitsunday one thousand eight hundred and seventy-six.

Commuta-
tion of
petty
customs.

APPENDIX No. XIV B.

ANNO TRICESIMO NONO ET QUADRAGESIMO

VICTORIÆ REGINÆ.

CAP. XXV.

AN ACT TO AMEND THE LAW IN SCOTLAND IN REGARD TO
THE DIVISION OF BURGHs INTO WARDS.—[13th July
1876.]

31 & 32
Vict.
c. 102.

WHEREAS by the “General Police and Improvement (Scotland) Act, 1862, Amendment Act,” provision is made for the division into wards of a burgh in the sense of that Act, not being a royal or parliamentary burgh, having, by the census last taken, a population of above ten thousand persons :

31 & 32
Vict.
c. 108.

And whereas by the Municipal Elections Amendment (Scotland) Act, 1868, provision is made for the division into wards of any royal or parliamentary burgh having, by the census last taken, a population of above ten thousand persons :

And whereas it is expedient to amend such provisions :

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Extent of
Act.
Construc-
tion of
Act.
Amend-
ment of
recited
Acts.

I. This Act shall extend to Scotland only.

II. This Act shall be read and construed together with the recited Acts respectively.

III. The sixth section of the first-recited Act, and the seventeenth section of the second-recited Act, shall be read and construed as if for the words “ten thousand” therein respectively the words “five thousand” were substituted.

APPENDIX No. XIV C.

ANNO QUADRAGESIMO ET QUADRAGESIMO PRIMO

VICTORIÆ REGINÆ.

CAP. XXII.

AN ACT TO AMEND THE GENERAL POLICE AND IMPROVEMENT (SCOTLAND) ACT, 1862.—[12th July 1877.]

WHEREAS it is expedient to amend in certain respects ^{25 & 26} the General Police and Improvement (Scotland) Act, ^{Vict. c. 101.} 1862:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. This Act may be cited for all purposes as "The General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1877," and shall apply to Scotland only. ^{Title and extent of Act.}

II. The recited Act and "The General Police and Improvement (Scotland) Act, 1862, Amendment Act," and ^{Construction of Act.} this Act, shall be read and construed together.

III. "Court of Session" and "Court" shall mean either ^{Interpretation clause.} Division of the Inner House of the Court of Session or the Lord Ordinary officiating on the Bills in the time of vacation.

IV. Wherever in any burgh, the boundaries of which ^{Court of Session may} have been determined in terms of the recited Act, it has, ^{make orders} either before or after the passing of this Act, from a ^{to facilitate} failure to observe any of the provisions of the recited Act, ^{adoption or} or from any other cause, become impossible to proceed ^{execution of} with the adoption or with the carrying out or execution, ^{recited Act.} as the case may be, of the said Act within such Burgh, the following provisions shall have effect:

1. It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, setting forth the failure which has taken place to observe the provisions of the recited Act, or other cause which has made it impossible to proceed with its adoption or carrying out or execution, and praying the Court to pronounce an order in terms of this Act as herein-after mentioned.

2. The petition shall be intimated in the Edinburgh Gazette, and in such other manner as the Court shall appoint.

3. Upon resuming consideration of the petition, with or without answers, and after receiving such evidence as they shall require, the Court may pronounce any order which in their judgment will enable the proceedings for the adoption or carrying out or execution of the recited Act within such burgh to be continued as nearly as possible as if the said failure to observe the provisions of the said Act, or other cause, had not taken place; and such order shall be final, and shall be recorded in the Sheriff Court Books of the county within which such burgh is situate.

4. As soon as any directions contained in the said order of the Court shall have been complied with, the proceedings for the adoption or carrying out or execution of the recited Act within such burgh may proceed as nearly as possible in the same manner and with the same incidents as if the said failure to observe the provisions of the said Act, or other cause, had not taken place.

5. The Court may pronounce any order as to expenses of the petition and the proceedings following thereon, and as to the persons or assessments against which they shall be chargeable; and such order shall be final.

Amendment
of sect. 14
of recited
Act.

V. The fourteenth section of the recited Act shall be read and construed as if for the words "two years" therein the words "one year" were substituted.

APPENDIX No. XIV^D.

ANNO QUADRAGESIMO PRIMO ET QUADRAGESIMO SECUNDO

VICTORIÆ REGINÆ.

CAP. XXX.

AN ACT TO ALTER THE TIME OF ELECTING COMMISSIONERS
UNDER THE GENERAL POLICE AND IMPROVEMENT
(SCOTLAND) ACT, 1862.—[22*d* July 1878.]

BE it enacted by the Queen's most Excellent Majesty,
by and with the advice and consent of the Lords Spiritual
and Temporal, and Commons, in this present Parliament
assembled, and by the authority of the same, as
follows:

I. This Act may be cited as the General Police and Improvement (Scotland) Amendment Act, 1878, and shall be construed as one with the General Police and Improvement (Scotland) Act, 1862, and any Acts amending the same.

Short title
and con-
struction
of Act 25
& 26
Vict. c.
101.

II. Sections fifty and fifty-one of the principal act are hereby repealed, and in lieu thereof the provisions contained in the two following sections of this act shall have effect in regard to the election and rotation of commissioners under the principal act.

Repeal of
ss. 50 and
51 of 25
& 26 Vict.
c. 101.

III. One third of the commissioners, or where the burgh is divided into wards one third of the commissioners for each ward, shall, save as herein-after provided, go annually out of office on the first Tuesday of November in each year, and on the first Tuesday of November annually the places of the commissioners going out of office shall be supplied by an equal number of new commissioners, to be elected from among the householders of the burgh under all the rules, regulations, and provisions now in force applicable to a first election

One third
of Com-
missioners
to be
elected an-
nually.

under the principal act, and the like notice of such annual election shall be given as is in the principal act directed to be given of such first election of commissioners: Provided always, that where the first election of commissioners under the principal act shall take place on or after the first day of May in any year no commissioner shall go out of office and no second election of commissioners shall take place until the first Tuesday of November in the year succeeding that in which the first election took place: Provided also, that no commissioner or magistrate of police in office at the passing of this act shall go out of office until the first Tuesday of November following.

Rotation
of Com-
missioners.

IV. The third of the commissioners who shall go out of office at the second election of commissioners under the principal act as amended by this act shall consist of the commissioners who at the first election under the principal act had the smallest number of votes, and where the burgh is divided into wards of the commissioners who at the said first election in each ward had the smallest number of votes in such ward; and the commissioners who shall go out of office at the third election of commissioners under the principal act as amended by this act shall consist of the commissioners who at the first election had the next smallest number of votes, and where the burgh is divided into wards of the commissioners who at the said first election in each ward had the next smallest number of votes in such ward; and thereafter the third of the commissioners who shall annually go out of office shall consist of the commissioners who have been longest in office: Provided always, that in any case where commissioners shall have been elected without a poll or where there shall have been an equality of votes the commissioners shall decide at a meeting convened for the purpose which commissioners elected without a poll or having an equality of votes shall go out of office: Provided also, that the senior magistrate of police shall always remain in office for three years after his election as such senior magistrate, and for that purpose he shall be held to have had the largest number of votes at the said first election, and to have been the shortest period in office at all elections subsequent to the third election under the principal act as amended by this act.

APPENDIX XV.

MEMORIAL

FOR THE

RETURNING OFFICERS OF THE BURGHS OF SCOTLAND.

FOR

THE OPINION OF COUNSEL.

By “The Ballot Act 1872” (35 and 36 Victoria, cap. 33), important changes have been effected in the mode of conducting Municipal Elections in Scotland, and the Memorialists are desirous to be advised by Counsel,—*First*, As to how far the provisions of that Act supersede the provisions of previous Acts, general and local; and *Second*, As to various points of difficulty which they anticipate will arise in carrying into effect provisions of the Ballot Act which undoubtedly do apply to Municipal Elections in this country.

Before referring to these matters in detail, it may be observed that the Ballot Act deals with both Parliamentary and Municipal Elections in England, Scotland, and Ireland, and that while its clauses and schedules have been framed with special reference to the laws and practice of England, they have been applied to Scotland and Ireland, subject to various provisions which are intended to adapt them to the laws and practice of these countries respectively.

Thus, Part I. of the Act deals with "PARLIAMENTARY ELECTIONS," under the heads "Procedure at Elections," "Offences at Elections," "Amendment of the Law," "Duties of Returning and Election Officers," "Miscellaneous;" and then under the head, "Application of Part of Act to Scotland," enacts, by section 16, "This part of this act shall apply to Scotland, subject to the following provisions, &c.,"—these provisions being intended to alter, adapt, and supplement some of the previous enactments and to prevent others from applying to Scotland at all.

Part II. deals with "MUNICIPAL ELECTIONS," enacting by clause 20, as follows:—

"The poll at every contested Municipal Election, shall, so far as circumstances admit, be conducted in the manner in which the Poll is by this Act directed to be conducted at a contested Parliamentary Election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act, and of the said schedules as relate to or are concerned with a poll at a Parliamentary Election shall apply to a poll at a contested Municipal Election: Provided as follows:—"

"(1.) The term 'returning officer' shall mean the mayor or other officer, who, under the law relating to municipal elections, presides at such elections:

"(3.) The mayor shall provide everything which, in the case of a Parliamentary Election, is required to be provided by the returning officer for the purpose of a poll."

These sub-sections are followed by this enactment,—

"A Municipal Election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed."

Part II. of the Act is then applied to Scotland by section 22, which enacts,—

"This part of this Act shall apply to Scotland, subject to the following provisions:—"

"(1.) The term 'mayor' shall mean the provost or other chief magistrate of a municipal borough, as defined by this Act."

"(2.) All Municipal Elections shall be conducted in the same manner in all respects in which elections of councillors in the Royal Burghs contained in Schedule C to the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy six, intituled 'An Act to alter and amend the laws for the Election of the Magistrates and Councillors of the Royal Burghs in Scotland,' are directed to be conducted by the

Acts in force at the time of the passing of this Act as amended by this Act; and all such Acts shall apply to such elections accordingly."

Part III. deals with "PERSONATION" in four sections, one of which,—section 26,—enacts that "This part of this Act shall apply to Scotland, subject to the following provision," which it is not necessary to quote.

Part IV. contains "MISCELLANEOUS" provisions, to some of which only is it necessary to refer.

By sections 28, 29, and 30, it is enacted as follows:—

"28. The Schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act.

"29. In this Act—

"The expression 'municipal borough' means any place for the time being subject to the Municipal Corporation Acts, or any of them:

"The expression 'Municipal Corporation Acts' means—

"(b.) As regards Scotland, the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy-six, intituled 'An Act to alter and amend the laws for the Election of Magistrates and Councillors of the Royal Burghs in Scotland,' and the Act of the same session, chapter seventy-seven, intituled 'An Act to provide for the appointment and election of Magistrates and Councillors for the several Burghs and Towns of Scotland which now return or contribute to return Members to Parliament, and are not Royal Burghs,' and the Act of the session of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter thirty-three, intituled 'An Act to make more effectual provision for regulating the Police of Towns and populous Places in Scotland, and for paving, draining, cleansing, lighting, and improving the same;' and 'The General Police and Improvement (Scotland) Act, 1862,' and any Acts amending the same:

"The expression 'municipal election' means—

"(b.) As regards Scotland, an election of any person to serve the office of councillor or commissioner of any municipal borough, or of a ward or district of any municipal borough:

"30. This Act shall apply to any parliamentary or municipal election which may be held after the passing thereof."

Section 32 repeals various acts relating to Scotland, specified in the fifth schedule, to the extent specified in the third column of the schedule, and it also repeals

“all other enactments inconsistent with” the Ballot Act, subject to certain provisions to which it is not necessary to refer.

Section 33 enacts as follows:—

“ This Act may be cited as the “The Ballot Act 1872,” and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty, and no longer, unless Parliament shall otherwise determine ; and on the said day the Acts in the fourth, fifth, and sixth schedules shall be thereupon revived ; provided that such revival shall not affect any Act done, any rights acquired, any liability or penalty incurred, or any proceeding pending under this Act, but such proceeding shall be carried on as if this Act had continued in force.”

The first Schedule to the Act, referred to in section 28 above quoted, consists of two parts. Part I. contains “RULES FOR PARLIAMENTARY ELECTIONS,” and sets forth minute directions in regard to “Election,” “The Poll,” “Counting Votes,” “General Provisions,” and “Modifications in Application of Part I. of Schedule to Scotland” and Ireland respectively. Part II. contains “RULES FOR MUNICIPAL ELECTIONS,” with “Modifications in the Application of Part II. of Schedule to Scotland” and Ireland respectively.

The second Schedule to the Act contains forms *inter alia* of a nomination paper in a parliamentary election, of a ballot paper, of directions for the guidance of the voter in voting, of declaration of secrecy, and of a declaration of inability to read, and these are prefaced by the following note:—

“ *Note.*—The forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit, shall be used in all cases to which they refer and are applicable, and when so used shall be sufficient in law.”

The third Schedule specifies certain provisions of English and Irish Registration Acts to which it is not necessary to refer.

Schedules Fourth, Fifth, and Sixth, specify certain Acts of Parliament applicable to England, Scotland, and Ireland, which are either wholly or partially repealed by the Ballot Act.

From the provisions of the Act above quoted and referred to, it appears—

FIRST. That the law and practice in regard to municipal elections in Edinburgh, Glasgow, Aberdeen, Dundee, Perth, Dunfermline, Dumfries, and Inverness (the burghs specified in schedule (C.) of 3 and 4 Will., c. 76), remain unaffected, except—

- (1.) In so far as relates to *the taking of the poll* in the event of an election being *contested*;
and possibly
- (2.) In so far as relates to the *nomination of candidates*, and the statutory public intimation following upon the nomination.

The Memorialists entertain doubts, however—

1. As to whether the future nomination of candidates must continue to be made in the form and according to way and manner prescribed by “The Municipal Elections Amendment (Scotland) Act, 1868;” or whether it must be made in the form and according to the way and manner prescribed by the Ballot Act.

2. Whether elections of councillors *ad interim*, in which more persons are proposed for election than the number of vacancies to be supplied, are to be regarded as *contested* municipal elections.

With reference to the first of these doubts, it is to be remarked that, by the 9th section of the “Municipal Elections Amendment (Scotland) Act 1868,” (which will afterwards be referred to as “The Act of 1868,”) no person can be elected to the office of town councillor in any Royal or Parliamentary Burgh unless the name of such person is intimated to the town clerk in the way and manner specified in schedule (B) of that Act, or as near thereto as circumstances admit, on or before four o’clock afternoon of the Thursday immediately preceding the day of election; and the town clerk is required, on or before the Friday immediately preceding such election, to cause public notice of the names of all persons so intimated to him, to be given in the way and manner specified in

schedule (C) of that Act, or as near thereto as circumstances admit. The nomination thus prescribed must be made by two registered electors, who must be designed as in the municipal register for the Burgh, and who must sign the nomination paper. If the number of persons so intimated does not exceed the vacancies to be supplied in the burgh or ward, the town clerk is required, by section 3 of the "Municipal Elections Amendment (Scotland) Act 1870," (which will afterwards be referred to as "The Act of 1870,") to give public notification of the fact that no poll will take place. This notification, it is declared, may be made by an addition to the notice required by the Act of 1868, in the terms set forth in the schedule to the Act of 1870, or in similar terms. And on the day appointed for declaring the election, the persons so nominated are declared to be duly elected as councillors for the burgh in the same manner as if they had been elected by a majority of voters on a poll. If, on the other hand, the number of persons so nominated exceeds the vacancies to be supplied in the burgh or ward, a poll must take place on the following Tuesday, and the candidate who is found to have received the largest number of votes, is declared to be elected.

It cannot be said that any election is contested until a larger number of candidates is actually nominated than there are vacancies to be supplied; and it is therefore obvious enough, that if section 20 of the Ballot Act were to be alone regarded, the provisions of that Act would not affect the form of nomination prescribed by the Act of 1868. But it is to be noticed that the form of nomination paper given in the second schedule to the Ballot Act has appended to it this note,—

"The form of nomination paper in a municipal election shall as nearly as circumstances admit be the same as in the case of a parliamentary election."

It may also be remarked that an "Abstract of the principal provisions of the Ballot Act 1872, for the information of Returning Officers at Parliamentary and Municipal Elections in Scotland," issued by the Lord Advocate, contains the following paragraph:—

“ The provisions of the former law with respect to the nomination at municipal elections in the royal burghs contained in schedule C. to the Act 3 and 4 W. 4, c. 76, remain unaltered, except that the form of nomination paper is to be similar to that contained in the second schedule ; and that these provisions (which are contained in section 9 of the Act 31 and 32 Vict. c. 108,) are by the Ballot Act extended to nominations in all municipal elections.”

The difference between the two forms of nomination is considerable. By the Act of 1868, the nomination has to be signed by only two registered electors. By the Ballot Act, it must be signed by two registered electors of the burgh as proposer and seconder, and by eight other registered electors of the burgh as assenting to the nomination.

Moreover, the nomination paper prescribed by the Ballot Act, in the case of parliamentary elections, has to be delivered to the *returning officer* by the candidate himself, or by his proposer, or seconder. That prescribed by the Act of 1868 must be delivered to the *town clerk*, and may be lodged by any person.

Schedule (C.) of the Act of 1868, it will also be seen, embodies only the particulars required in schedule (B.) of the same Act, viz., the name of the candidate, his place of abode, the names of his proposer and seconder, and their places of abode.

If, then, the nomination paper prescribed by the Ballot Act must be used in municipal elections in Scotland, and if the particulars which that nomination paper contains must be embodied in the public intimation of the names of the candidates, which is directed to be given by section 9 of the first schedule of the Ballot Act, schedule (C.) of the Act of 1868 will have to be considerably altered. Rule 9 of schedule first of the Ballot Act prescribes that, if the election is contested, the returning officer shall, as soon as practicable after adjourning the election, give public notice, *inter alia*, of the candidates described as in their respective nomination papers, and of the names of the persons who subscribe the nomination paper of each candidate. Now, the eight assenters, as well as the proposer and seconder, subscribe the nomination paper,

and it would probably be considered necessary to give the names of all, though Rule 11 only requires the returning officer to publish notice of the name of the person nominated as a candidate, and of the names of his proposer and seconder, by placarding their names in a conspicuous position outside the building in which the room is situated appointed for the election. It is also to be observed, that the intimation which the Ballot Act requires to be given of the names of the candidates, and of their proposers and seconders, and of the assenters to each nomination, falls to be given by the returning officer; whereas the intimation prescribed by the Act of 1868 and 1870 is directed to be given by the town clerk.

With reference to the doubts as to whether elections of councillors *ad interim*, in cases where a vote is necessary, must be regarded as *contested* municipal elections, it may be proper to state, that by section 25 of the Act 3 and 4 Will. IV., c. 76, it is enacted as follows:—

“That if any vacancy shall in the course of the year occur in the Council or Magistracy or Office Bearers of any such Burgh by death, disability, or resignation, the same shall be filled up *ad interim* by the remaining Members of the Council, by election, as herein-before provided, at a meeting to be called on Five Days' Notice by the Town Clerk by intimation in writing to each of such remaining Members of the Council; but any Councillor, Magistrate, or Office Bearer so elected *ad interim* shall go out of office on the First TUESDAY of NOVEMBER next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of Councillors and Magistrates or Office Bearers in such Burgh; provided that if the vacancy shall have occurred in any Burgh contained in the said Schedule (C.), such vacancy shall at such annual election be supplied by the Ward of such Burgh by which the Councillor who had died or resigned, or been disabled, had been elected, and which shall in this case elect an additional Councillor, unless the party so dying or disabled would then have gone out of office as one of the Third hereby directed to retire.”

Under this law the expense of a poll has been obviated in all cases of interim election. The vacancy has been filled by the remanent members of council, and when two or more candidates have been proposed, a vote of the council has settled the question. Now the Ballot Act is silent as to elections *ad interim*, and it does not

touch the section above quoted. It has been seen, however, that the Ballot Act is declared by section 30 to apply "to any" municipal election which may be held after the passing thereof,—this declaration being read in connection with the provision in section 20, to the effect that except in so far as relates to the taking of the poll in the event of its being contested, municipal elections shall be conducted in the manner in which they would have been conducted if the Ballot Act had not passed. It has also been seen that the expression "municipal election" means "an election of any person to serve the office of councillor or commissioner of any municipal burgh, or of a ward or district of any municipal burgh." What, then, is to be done hereafter in regard to elections *ad interim*? Must they still be made by the remanent members of council? And if two persons are proposed for election as a councillor *ad interim*, necessitating a vote, must that be regarded as a *contested election* requiring to be decided by ballot? And if such a case is to be dealt with as a *contested* election, who are to be regarded as the candidates?—those proposed in the council, or such persons as may be nominated by the municipal electors in the way prescribed in the Ballot Act? The abstract of the provisions of the Act, issued by the Lord Advocate, states that "every election, whether parliamentary or municipal, although only to supply a *casual vacancy*," must be conducted in accordance with the provisions of the Ballot Act. But what are its provisions in such a case?

There seems to be room for doubt also as to whether polling places have now to be provided, and their situation publicly intimated, by the provost or chief magistrate as returning officer, or by the town clerk.

By section 9 of the Act 3 and 4 William IV., chapter 76, it was enacted that no poll thereby authorised should be kept open for more than one day, and that only between the hours of eight in the morning and four in the afternoon, and it was declared to be

"*Compensate in the most effectual manner as many polling places in each ward and as many more as it is necessary at each polling place as may be necessary for completing the said elections within the said period.*"

By sections 9 and 25, he was also required to give public intimation of the situation of the several polling places in the way and manner specified in section 8. Section 7 of the Act 3 and 4 William IV. c. 77. imposed upon the justices or chief or senior magistrate of each of those parliamentary burghs which were divided into wards the duty of appointing the polling places—declaring that it should be lawful to him

"*to appoint such and as many additional polling places or booths as may be necessary for ensuring the completing of such election within one day.*"—

while section 25 directed all notices and intimations to be given by the town clerk. Section 9 of the same Act again provided that in those parliamentary burghs in which the electors voted by signed lists they should "*assemble in the town hall or other public place to be appointed and notified by the town clerk.*" And section 16 of "The Municipal Elections Amendment (Scotland) Act 1868" provided

"*That if in any burgh it shall appear to the town clerk that more than one polling place or compartment is required for municipal elections in any of the wards, he shall provide such additional number as may be necessary, and publish the same in the manner set forth in the Act 3 and 4 William IV., c. 76.*"

Under these Acts, there can be no doubt the town clerks of those royal burghs which are divided into wards were bound to provide polling places; and as by the Ballot Act the election of town councillors and commissioners or trustees of police, in all royal and parliamentary burghs, and burghs and places under the operation of the General Police Acts of 1850 and 1862, are appointed to be conducted in the same manner, in all respects, as elections of councillors in Edinburgh, &c., are directed to be conducted by the Acts in force at the time of the passing of the Ballot Act, as amended by that Act, it would follow that unless the duty is transferred to returning officers by the Ballot Act, the town clerks of all burghs, royal and parlia-

mentary, and in all towns and places under the operation of the General Police and Improvement Acts of 1850 and 1862, would have to provide such polling places as may be necessary. Does the Ballot Act, then, effect that transfer?

Section 8, dealing with parliamentary elections, provides as follows:—

“ Subject to the provisions of this Act, every returning officer shall provide such nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of register of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in manner provided by this Act.”

Rules 15 and 16 of schedule first are in the following terms:—

“ 15. At every polling place the returning officer shall provide a sufficient number of polling stations for the accommodation of the electors entitled to vote at such polling place, and shall distribute the polling stations amongst those electors in such manner as he thinks most convenient, provided that in a district borough there shall be at least one polling station at each contributory place of such borough.

“ 16. Each polling station shall be furnished with such number of compartments, in which the voters can mark their votes screened from observation, as the returning officer thinks necessary, so that at least one compartment be provided for every one hundred and fifty electors entitled to vote at such polling station.”

Then section 20, dealing with municipal elections, applies such provisions of the Ballot Act and its schedules as relate to or are concerned with polls at parliamentary elections, to polls at contested municipal elections, and expressly provides in sub-section—

(3.) “ The mayor shall *provide* everything which, in the case of a parliamentary election, is required to be provided by the returning officer for the purpose of a poll.”

But the same section concludes with the enactment that a municipal election shall, except in so far as relates to *the taking of the poll in the event of its being contested*, be conducted in the same manner in which it would have been conducted if the Ballot Act had not passed. Can it be said that the providing of polling places, and the intimating of their situation publicly,—acts which must

precede the nomination of candidates, and consequently be completed before it can be known whether there is to be a contest or not,—relate to the taking of the poll in the event of an election being contested? If they do, then it is presumed the provisions of the former law, under which town clerks had to perform them, must be held to be superseded. If they do not relate to the taking of the poll, then it is presumed the former law on the subject is still operative, and town clerks are still charged with the duty of providing polling places, while the provosts or chief magistrates will have to provide everything else which may be necessary.

Upon the interpretation which must be put upon the words “except in so far as relates to the taking of the poll in the event of an election being contested,” depends the solution of other questions which the Memorialists desire to bring under the consideration of Counsel.

1. Are the provisions of section 8 of the Act 3 and 4 William IV., c. 76, and of section 4 of the Act 3 and 4 William IV., c. 77, in regard to the qualifications of the substitutes to be appointed by the provost or chief magistrate to officiate and preside at polling places, still operative, or are they superseded by the provisions of the Ballot Act?

By these sections, (portions of which, so far as relating to elections by *open* poll, are repealed by the Ballot Act,) the poll is directed to be taken at the polling places appointed for each ward, in the presence of the provost or chief or senior magistrate, or of a legal substitute to be appointed by him,—such substitute being always an Advocate, or Writer to the Signet, or a Solicitor of Supreme Courts, or a Procurator in the Inferior Courts, of not less than three years' standing respectively. But it is noticeable that those portions of the sections which refer to these qualifications, are not repealed.

In the Ballot Act, the officer who presides at each polling station is called the “presiding officer;” and the returning officer is directed by Rule 21 of Schedule First

to appoint one to each station, who shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty. The duties which presiding officers will have to perform under the Act are onerous and responsible, and will require for their proper discharge intelligence, prudence, firmness, and considerable business aptitude. But no professional status or experience is prescribed by the Ballot Act. In these circumstances, must it be held that the qualification of presiding officers is a matter which "relates to the taking of the poll," and must be dealt with exclusively under the provisions of the Ballot Act? Or must it be held that it does not properly "relate to the taking of the poll," and that therefore the provisions of the law on this subject as it existed previous to the passing of the Ballot Act, are unaffected? It is understood that in some of the larger burghs, like Glasgow, it will be difficult, if not impossible, to obtain a sufficient number of presiding officers having the qualifications prescribed by the Acts of 3 and 4 William IV., cap. 76 and 77.

2. When must the returning officer proceed to count the votes after the poll has been closed, and to declare the result?

By section 10 of the Act 3 and 4 Will. IV., c. 76, it was enacted that at all elections of councillors for the burghs contained in schedule (C.), the poll books for the several wards should, at the close of the poll, be sealed up by the persons who presided at the elections of the several wards, and should be transmitted to the provost or chief or senior magistrate, who, *on the next lawful day after the receipt of the same*, between the *hours of twelve and two*, should openly break the seals, and cast up the votes given, and *declare upon whom the election had fallen by the majority of votes*, and should forthwith give, or cause to be given, notice in writing to the several persons elected of such their election, and require them severally to

appear on the second lawful day after such election, when they should severally declare whether they accepted or declined accepting the office of councillor. A similar provision was made by section 8 of the Act 3 and 4 William IV., cap. 77, in regard to parliamentary burghs which were divided into wards. Section 10 above referred to is, however, repealed by schedule fifth of the Ballot Act, "in so far as it relates to poll books;" and section 8 is wholly repealed by the same schedule. The Ballot Act itself fixes no precise time at which the returning officer shall count the votes and declare the result. The following are its provisions on this subject:—

"After the close of the poll, the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given."

Rules 32 and 35 of schedule first also relate to this subject, and are in the following terms:—

32. "The returning officer shall make arrangements for counting the votes in the presence of the agents of the candidates as soon as practicable after the close of the poll, and shall give to the agents of the candidates appointed to attend at the counting of the votes notice in writing of the time and place at which he will begin to count the same."

35. "The returning officer shall, so far as practicable, proceed continuously with counting the votes, allowing only time for refreshment, and excluding (except so far as he and the agents otherwise agree) the hours between seven o'clock at night and nine o'clock on the succeeding morning. During the excluded time the returning officer shall place the ballot papers and other documents relating to the election under his own seal and the seals of such of the agents of the candidates as desire to affix their seals, and shall otherwise take proper precautions for the security of such papers and documents."

If the "counting of the votes" can be held to "relate to the taking of the poll," then the provisions of the Ballot Act above quoted may be held to supersede the provisions of section 8 of the Act of 3 and 4 Will. IV., c.

76. It may be observed that “The Municipal Elections Amendment (Scotland) Act, 1870,” and the schedule appended to it, provide that when only such a number of candidates is proposed for election as is required to supply the vacancies in any burgh or ward, no poll is to take place, and “*on the day appointed for declaring the election,*” the persons so nominated shall be declared to be duly elected. The day here referred to is the day mentioned in section 8 of the Act 3 and 4 Will. IV., c. 76—viz., the day immediately succeeding the first Tuesday in November; and if that provision is held as repealed, there is no other enactment fixing a day for declaring municipal elections.

No doubt, in large burghs, where the elections may be contested in several wards, the labour of counting the votes, with all that it implies, will be so great, as to render it physically impossible to accomplish the counting between 12 and 2 o'clock on the day after the election. In such circumstances, would the necessities of the case justify the commencement of the counting at an earlier time, and the declaration of the result of the poll at a later hour, than the Act of 3 and 4 Will. IV., c. 76, contemplates? There will also be considerable popular anxiety in some elections, to know the result of the poll as soon as possible, and as that cannot be authoritatively ascertained under the system of ballot, as was done under the old system, the returning officer may wish to count the votes and declare the election as soon as possible,—probably on the evening of the election. Would he be justified in doing so, if he saw his way to completing the operation the same night?

Several other questions and difficulties have been suggested in connection with the working of the Ballot Act and the previous election Acts, as to which the advice of Counsel is desired.

1. As regards the person who should perform the several duties appertaining to a returning officer in relation to a municipal election in a burgh in which the

provost or chief magistrate retires from office on the day when such election falls to be made.

When a provost or chief or senior magistrate does not retire at the next annual election, he, as a matter of course, has to perform all the duties of returning officer at that election.

There is as little difficulty when the provost or chief or senior magistrate, and all the other magistrates, fall to retire at the next annual election. This contingency is provided for by sections 5 and 6 of the Act 15 and 16 Victoria, cap. 32, which are in the following terms:—

“ 5. Whereas by the said first-recited act, [3 and 4 Will. IV., cap. 76] and by the seventy-seventh chapter of the statute, passed in the same year of King William the Fourth, it is provided that one-third of the councils of the burghs therein respectively referred to shall go out of office annually, and difficulties have arisen in consequence of the provost and magistrates of a burgh having been included in the third part of the council so going out of office, whereby their powers ceased before their successors were elected : For remedy whereof, whenever it shall so happen that the provost and magistrates of any of the said burghs shall all be included in the one-third of the council going out of office as aforesaid, they shall nevertheless retain and continue to exercise all the powers and functions of their several offices of provost and magistrates respectively until the election and coming into office of their successors ; but they shall not, after the period of their so going out of office, be entitled to act or vote as councillors.

“ 6. At the first meeting of the council of any such burgh after the annual election, but before the election of the provost and magistrates, the provost or senior magistrate who may continue to be a member of council, and be present at the said meeting, shall preside thereat, and shall at such meeting have a deliberative and in case of equality of votes a casting vote ; and if the provost and all the magistrates shall be in the number of councillors retiring from office, then the retiring provost or chief magistrate, or failing them the retiring magistrate next in seniority, shall attend and preside at such meeting until the meeting shall have elected the provost and magistrates respectively, as the case may be, and no longer, and such provost or magistrate shall have no deliberative vote in such meeting, but shall, in case of equality of votes, have a casting vote.”

But the difficulty arises when the provost or chief magistrate retires on the first Tuesday of November, and other magistrates remain in office. In that case, he exercises all his functions till the morning of

the election, when he is succeeded by the senior bailie as acting chief magistrate. Now, the "returning officer," who is defined to be the provost or other chief magistrate of a burgh in Scotland, and, under the law relating to municipal elections, presides at such elections, has to make all the arrangements necessary for an election, including those specified in section 8 of the Ballot Act, which has been already quoted. These arrangements cannot be delayed till the morning of the election day, when the senior bailie, who superintends the poll and has to count the votes, becomes acting chief magistrate. Much must be provided before then, and it is presumed the duty of making the necessary provision rests with the provost so long as he is in office. But can he appoint the presiding officers, assistants, and clerks who are to conduct the election in which he is not to act as returning officer? The poll has to commence at eight o'clock on Tuesday morning, and it is almost impossible, between midnight of Monday and the commencement of the poll, to get the requisite declarations administered to the several presiding officers and clerks, and their appointments signed. What, then, is to be done? Would it be sufficient to have the appointments made, and declarations taken by both the provost and the bailie who is to become acting chief magistrate? or would the act of the provost during his chief magistracy even in appointing the officers who are to conduct the election after his retirement from office, be sufficient? In Edinburgh, fortunately, all question is removed by a provision in section 16 of the Edinburgh Municipality Extension Act 1856, which enacts—

"That the appointment by the lord provost or senior magistrate immediately before any annual election of legal substitutes to preside at the polling places, and of persons to officiate as poll clerks in the several wards, shall be valid notwithstanding the going out of office of the lord provost or senior magistrate after the making of such appointment."

But there is no analagous provision in any of the general Acts relating to municipal elections in Scotland.

2. As regards nomination papers which may appear to be irregular or informal.

If the provisions of the Ballot Act in regard to the form of nomination papers, and requiring them to be delivered to the provost or chief or senior magistrate, shall be held to be applicable to municipal elections, it is presumed the directions of Rules 5, 6, and 13 of schedule First of the Act will also be held to be applicable to these elections. These rules are expressed as follows:—

“5. Each candidate shall be nominated by a separate nomination paper, but the same electors or any of them may subscribe as many nomination papers as there are vacancies to be filled, but no more.

“6. Each candidate shall be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate; the description shall include his names, his abode, and his rank, profession, or calling, and his surname shall come first in the list of his names. No objection to a nomination paper on the ground of the description of the candidate therein being insufficient, or not being in compliance with this rule, shall be allowed or deemed valid, unless such objection is made by the returning officer, or by some other person, at or immediately after the time of the delivery of the nomination paper.”

“13. The returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final; but if allowing the same, shall be subject to reversal on petition questioning the election or return.”

If, on the other hand, it shall be held that the provisions of the Ballot Act alluded to do not apply to municipal elections, and that the form of nomination paper must still be that prescribed by the Municipal Elections Amendment (Scotland) Act 1868, and that the nomination of candidates must be made to the town clerk, and intimated by him as directed by that Act and the Act of 1870,—must the town clerk reject such nomination papers as do not strictly comply with the provisions of the Act of 1868 and relative schedule? or will he be entitled to exercise his discretion, and to give effect to such a nomination paper as in his judgment sufficiently identifies the candidate and his proposer and seconder, though the description may not be a literal compliance with the Act? In other words, would he be safe in exercising a discretion similar to that vested in the returning officer by Rule 6 of schedule First of the Ballot Act above quoted?

3. As regards voting papers.

It is enacted by section 2 of the Ballot Act that each voter, after secretly marking his vote on the ballot paper, and folding it up *so as to conceal his vote*, shall place it in the ballot box *in the presence of the presiding officer*. And it is further enacted that

“ Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything, except the said number on the back, is written or marked by which the voter can be identified, shall be void and not counted.”

Now, suppose an elector, after marking his vote in one of the compartments of the polling station for this purpose, to bring out his paper unfolded, or to open it out after being folded, so as in either way to show how he has voted; or, suppose him to have written or marked his voting paper so as to enable it to be identified, would it be the duty of the presiding officer, seeing one or other of these irregularities committed, to prevent the ballot paper of such a voter to be deposited, or to report the offender for prosecution in terms of section 3 of this Act, or to deal with him under the provisions of section 9, or to adopt all the courses suggested?

It is to be observed that the specification of offences in section 3 of the Ballot Act, for the commission of which a voter is declared to be liable to punishment, does not include the showing of his voting paper, and so making known how he has voted; nor does it include the writing or marking on the ballot paper anything by which the voter can be identified, unless, indeed, he were afterwards to put it into the ballot box, and that fact could be held to bring him within the category of offences prescribed by sub-section (4), viz., “ fraudulently” putting into the ballot box “any paper other than the ballot paper *which he is authorised by law to put in*.”

In counting the votes, no doubt, the returning officer is directed by rule 36 of schedule first of the Ballot Act to reject voting papers liable to objection on various grounds, including some of those supposed above, and others which

the presiding officer might have no means of discovering. The cases supposed, however, in so far as they can be held to be violations of the law, are all open, brought under the notice of the presiding officer, and some of them, if unchecked or unreported by him, could not be discovered by the provost or chief or senior magistrate in counting the votes.

4. As regards securing secrecy on the part of candidates.

Section 20 of the Ballot Act, sub-section (6.) provides as follows:—

“(6.) Nothing in this Act shall be deemed to authorise the appointment of any agents of a candidate in a municipal election, but if in the case of a municipal election any agent of a candidate is appointed, and a notice in writing of such appointment is given to the returning officer, the provisions of this Act with respect to agents of candidates shall, so far as respects such agent, apply in the case of that election.”

Rule 54 of schedule first directs as follows:—

“54. Every returning officer, and every officer, clerk, or agent authorised to attend at a polling station, or at the counting of the votes, shall, before the opening of the poll, make a statutory declaration of secrecy, in the presence, if he is the returning officer, of a justice of the peace, and if he is any other officer or an agent, of a justice of the peace or of the returning officer; but no such returning officer, officer, clerk or agent as aforesaid, shall, save as aforesaid, be required, as such, to make any declaration or take any oath on the occasion of any election.”

And the obligation of secrecy upon returning officers, presiding officers, clerks, and agents of candidates, is enforced by section 4, which is as follows:—

“4. Every officer, clerk, and agent in attendance at a polling station, shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark, and no such officer, clerk, or agent, and no person who-soever, shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to

the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the name, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.

“ Every person who acts in contravention of the provisions of this section, shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour.

Section 11 of the Act also enacts as follows:—

“ 11. Every returning officer, presiding officer, and clerk who is guilty of any wilful misfeasance or any wilful act or omission in contravention of this Act shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding one hundred pounds.

“ Section fifty of the Representation of the People Act, 1867, (which relates to the acting of any returning officer, or his partner or clerk, as agent for a candidate), shall apply to any returning officer or officer appointed by him in pursuance of this Act, and to his partner or clerk.”

But Rule 51 of schedule first, contains the following direction:—

“ 51. A candidate may himself undertake the duties which any agent of his if appointed might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may, in pursuance of this Act, attend.”

Thus, then, a candidate may himself attend the poll and the counting of the votes,—which no returning officer, presiding officer, assistant, clerk, or agent can enter upon without previously taking a declaration of secrecy. But there is no provision for his taking any such declaration, and the enactments of sections 4 and 11 do not appear to extend to him in the same way as to others officially engaged and expressly referred to. Can it be held that a candidate who undertakes the duties which any agent of his, if appointed, might undertake, becomes subject to all the obligations to which the agent would have been liable, and,

inter alia, that of secrecy; and should provosts or chief or senior magistrates, acting as returning officers, require all candidates to take a declaration of secrecy as a condition of being admitted to a poll or to the counting of the votes?

5. As regards the closing of the poll.

In the event of a voter being in a polling place for the purpose of voting, but not having actually received a ballot paper when four o'clock arrives, at which hour the poll is appointed to be shut, is he, by virtue of being in the polling place, entitled to receive and mark his ballot paper, and to place it in the ballot box before the box is closed?

In the event again of a voter being in a polling place, and having received a ballot paper before four o'clock, but not having marked and placed it in the ballot box before that hour, is he, by virtue of having received the ballot paper, entitled to mark it and deposit it in the ballot box?

In considering the latter question, it may be proper to have in view one of the provisions of section 15 of the Ballot Act, which enacts that

“Any person applying for a ballot paper under this Act shall be deemed “to tender his vote,” or “to assume to vote,” within the meaning of the said enactments; and any application for a ballot paper under this Act or expressions relative thereto, shall be equivalent to “voting” in the said enactments, and any expressions relative thereto.”

SECOND. That the law in regard to municipal elections in royal burghs, other than those specified in schedule (C.) of the Act 3 and 4 William IV., c. 76, and in the parliamentary burghs dealt with by the Act 3 and 4 William IV., cap. 77, is assimilated to the law heretofore in operation in Edinburgh and the several burghs specified in schedule (C.) aforesaid, as that law is amended by the Ballot Act.

In other words, the provisions of the former of these Acts in regard to the election of councillors in royal burghs, other than those specified in schedule (C.), and the provisions of the latter of these Acts, in regard to the

election of councillors in parliamentary burghs, are repealed by the Ballot Act, in so far as not previously repealed or altered by the acts of 1868 and 1870. And hereafter, so long as the provisions of the Ballot Act continue in force, the same rules and forms must be observed in all royal and parliamentary burghs in regard to the nomination of candidates, the publication of notices, the taking of polls and counting of votes in cases of contested elections in burghs or wards, and the declaration of elections, as the rules and forms which will have to be observed in Edinburgh and the other burghs specified in schedule (C.) of 3 and 4 William IV., c. 76.

THIRD. That the election of commissioners of police under the Police and Improvement (Scotland) Act, 1850, (13 and 14 Victoria, cap. 33), and under "The General Police and Improvement (Scotland) Act, 1862," and amending Acts, must hereafter, so long as the provisions of the Ballot Act continue in force, be conducted in the same manner in which elections of councillors in Edinburgh and the other burghs specified in schedule (C.) of 3 and 4 William IV., c. 76.

The opinion of counsel upon most of the points of difficulty which have been indicated in regard to the operation of the Ballot Act in royal burghs will, of course, be equally applicable to elections of commissioners of police under the General Police Acts of 1850 and 1862. But there are special difficulties in regard to them, to which the attention of counsel is now invited.

Under both of these Acts it will be seen the procedure in regard to elections was substantially the same. The chief or senior magistrate, or sheriff, as the case might be, had to convene a meeting of the householders of the burgh, or of the respective wards of such burghs as were divided into wards, in a prescribed way. At that meeting any householder might be nominated for election, and if his nomination was seconded, the magistrate, or sheriff, or preses, proceeded to ascertain the determination of the meeting by a show of hands, or in any other

way he considered expedient, and thereafter announced the result. If the election was unanimous, he declared the persons so nominated to be elected. If, on the other hand, the election was not unanimous, and if a poll was demanded in writing, the magistrate, or sheriff, or preses of the meeting, directed a poll to take place at an appointed time; poll clerks and poll books were provided the votes of the householders were entered in these poll books; and the result of the poll, as appearing in these books, was afterwards declared by the magistrate, or sheriff, or preses. If any candidate not returned felt himself aggrieved, he could complain in writing to other the commissioners at their first meeting; they remitted to a committee of three or five of their number to inquire into the merits of the disputed election; and their report to the commissioners was final. In the event of there being an equality of votes at any election, the commissioners were empowered to determine by vote which of the candidates should be preferred.

Under both of these Acts, in like manner, no fixed date was prescribed for the election of commissioners, as in the case of elections in royal and parliamentary burghs. The acts might be adopted at any time, and the election of commissioners had thereafter to take place with reference to the date of the adoption of the Act in the particular burgh. Both Acts required one third of the commissioners elected for each such burgh or ward to go out of office annually, "on the same day, at the expiration of a year, on which commissioners were last elected into office, or on the next lawful day thereafter." And on the same or the next lawful day, annually, the places of the commissioners going out of office had to be supplied by an equal number of new commissioners, chosen from among the householders of the burgh.

Under both of these Acts, moreover, as amended by "The General Police and Improvement (Scotland) Act 1862, Amendment Act," the qualification of the householders entitled to vote in the election of commissioners is different from that of the electors in royal and

parliamentary burghs. By the General Police Act of 1850, the householder was defined to mean a male occupier of a dwelling-house, or other heritable subject, of the yearly value of £10 or upwards. By the General Police Act of 1862, the householder was defined to mean a male occupier of lands and premises of the yearly value of £10 or upwards, in all burghs, except in populous places containing less than one thousand inhabitants; and in populous places containing less than that number of inhabitants, it is defined to mean a male occupier of lands or premises, of the yearly value of £6 or upwards. But by the Amendment Act above referred to, the word "Householder" in the Police Acts of 1850 and 1862 is declared to mean "a male occupier of lands or premises of the yearly value of £4 and upwards, as appearing in the valuation roll." By both the Acts of 1850 and 1862 also, while all householders were entitled to vote, every company occupying lands or premises of the yearly value required for the qualification of a householder, or of greater value, so as to afford more than one such qualification, was entitled to grant written authority to each of its partners to vote in respect of such lands or premises, subject to the provision that such company should not so authorise or have right to vote by more than one partner, in respect of each such qualification afforded by such premises. But by the Amendment Act above referred to, it is declared "that not more than six partners of any company or co-partnership shall be entitled to vote in respect of the lands or premises occupied by such company or co-partnership." In royal and parliamentary burghs the municipal franchise is the same as the parliamentary franchise.

In these circumstances, various questions arise in applying the provisions of the Ballot Act to elections of commissioners under these Acts. When that Act provides that all municipal elections, including the election of commissioners of police under the General Police Acts of 1850 and 1862, shall be conducted *in the*

same manner in all respects in which elections of councillors in Edinburgh, &c., are directed to be conducted by the Acts in force at the time of the passing of the Ballot Act as these Acts are thereby amended; does it mean,—

- (1.) That the annual elections of these police commissioners must hereafter be made on the first Tuesday of November, when the elections of councillors in royal and parliamentary burghs throughout Scotland take place?

In considering this question, it must be observed that no provision is made in the Ballot Act for securing that the police commissioners at present in office shall hold office till that date, and shall not hold office longer. On the other hand, it will be noticed that schedule fifth of the Ballot Act repeals section 50 of the Act of 1862, so far as its provisions are inconsistent with the provisions of that Act. And it is in virtue of clause 50 that the date of annual election of commissioners in police burghs under the Act of 1862, has hitherto been fixed and regulated by the date of the first election. It would certainly be desirable to have one time fixed for conducting all elections of police commissioners over the country, as has been done in regard to elections of town councillors in royal and parliamentary burghs.

- (2.) That the qualification of electors, as regards commissioners of police, shall be the same as the qualification of electors of town councillors in royal and parliamentary burghs?

If, in future, commissioners of police, under the Acts of 1850 and 1862, are to be elected by a ballot of the householders, a roll of these householders will, of course, have to be made up as provided for by these Acts; but the Ballot Act

provides no means for dealing with the votes of partners of companies holding mandates.

- (3.) That the chief magistrate or sheriff is henceforth not to convene meetings of the householders, and proceed to elect commissioners in the way and manner before described, but that the clerk of the commissioners is to issue notices and receive nominations of commissioners in the same way as the town clerks of Edinburgh, Glasgow, &c., issue notices under the Acts applicable to municipal elections in these burghs; and that thereafter the election of commissioners, whether contested or not, is to proceed and be declared in the same way as the election of town councillors in these burghs?

In considering this question, it is to be kept in view that if the Ballot Act contemplates such a change in the election of commissioners of police under the Acts of 1850 and 1862, it does not specify the days when notices are to be issued and nominations received, and that if all elections of commissioners are not henceforth to take place on the first Tuesday of November in each year, the only thing the clerk could probably do, would be to be guided by analogy, and fix the several dates of notices and nominations with reference to the day of election, as is done in the Acts of Parliament relative to elections in royal and parliamentary burghs.

- (4.) Are the provisions of the General Police Acts of 1850 and 1862, in regard to the procedure to be followed with reference to the complaints of unsuccessful candidates, still operative; or must all elections of commissioners of police under these Acts, hereafter be challenged in the supreme courts, in the same way as elections of town councillors?

Besides royal and parliamentary burghs, and burghs and populous places, under the operation of the General Police Acts of 1850 and 1862, there are several burghs in Scotland in which magistrates and councillors are chosen under the provisions of special charters or of local Acts, and in which the householders, when adopting the General Police and Improvement (Scotland) Act 1862, in whole or in part, have resolved that the magistrates and councillors should also be commissioners of police. In such burghs, accordingly, under section 41 of the Act of 1862, no special election of commissioners of police, or magistrates of police, takes place under the Act. In some royal and parliamentary burghs, again, where the magistrates and councillors are elected under the provision of the 3 and 4 William IV., chapters 76 and 77, and the amending Acts, the police commissioners and other public bodies are elected in a different way under the provisions of local Acts. Some anxiety is felt on the part of the authorities in various of these towns, to know whether the Ballot Act interferes with elections under their special charters or local Acts.

It has been seen that the municipal elections in Scotland, provided for in the Ballot Act, are only those of persons to serve the office of councillors or commissioners of burghs, or wards, or districts of burghs, *subject to* the "Municipal Corporation Acts," which Acts are defined to be the Acts of 3 and 4 William IV., chapters 76 and 77, and the General Police Acts of 1850 and 1862, and any Acts amending the same. The specification of these Acts in section 29 is very express, and no words are added to create doubt or dubiety, as might have been the case had the phraseology been used which has been employed in the same section with reference to Ireland. It will be observed, the term "Municipal Corporation Acts," is defined, as regards Ireland, to be the Act 3 and 4 Victoria, c. 108, the 9 George IV., c. 82, "and every local and personal act providing for the election of commissioners in any towns or places, for purposes similar to the said acts." The point to be

noticed in Scotland, however, is that the burghs referred to are actually *subject to* the Acts of 1850 and 1862, though the election of the magistrates and councillors who are commissioners of police in these burghs, falls to be made under special charters, or under local Acts different from the Acts of 1850 and 1862.

In view of the whole provisions of the Ballot Act, and the Acts relating to municipal elections in Scotland, Counsel is requested to advise the Memorialists—

First.—Whether the nomination of candidates must be made to the town clerk, in the form prescribed by Schedule (B.) of the “Municipal Elections Amendment (Scotland) Act 1868,” and otherwise, in terms of that Act, or to the provost or chief magistrate, as “returning officer,” in terms of the Ballot Act 1872, and according to the form in the second schedule of that Act? And if to the former, whether electors on the register of the burgh are entitled to sign as the proposer or seconder of a candidate for a ward in which they are not qualified to vote? And whether the public intimation of the names of the candidates must be given by the town clerk, in terms of the Acts of 1868 and 1870, or by the returning officer, in terms of the Ballot Act?

Ans. 1. The provisions of the Ballot Act do not, in our opinion, apply to the nomination of candidates at municipal elections; and we accordingly think that nominations ought to be lodged with the town clerk, and intimation of the names of the candidates given by him, in terms of the Acts of 1868 and 1870. It appears to us that, under the Act of 1868, the proposer and seconder of a candidate must be electors qualified to vote in the ward for which the candidate is nominated.

Second.—Do the provisions of the Ballot Act affect the election of councillors *ad interim*, or must these still continue to be conducted under the old law? If Counsel shall be of opinion that such elections, in cases where a vote is necessary, are contested elections, and fall within the operation of the Ballot Act,—how and between whom must a vote by ballot be taken?

Ans. 2. We are of opinion that the provisions of the Ballot Act have exclusive application to cases where the right of election belongs to the qualified electors of the burgh; and that *interim* elections by the council must continue to be conducted under the old law.

Third.—Are the provisions of the Act of 3 and 4 William IV., cap. 76, and of the Municipal Elections Amendment (Scotland) Act, 1868, in so far as they impose upon town clerks the duty of providing polling places, still operative; or are they superseded by the enactments of the Ballot Act, to the effect of charging provosts or chief or senior magistrates with that duty?

Ans. 3. In our opinion, provosts or other magistrates, being returning officers under the Ballot Act, are now charged with the duty of providing polling stations.

Fourth.—Are the provisions of section 8 of the Act 3 and 4 William IV., c. 76, in so far as they prescribe the qualifications of the substitutes to be appointed by the provost or chief or senior magistrate to officiate and preside at polling places, applicable to presiding officers to be appointed under the provisions of the Ballot Act?

Ans. 4. We are of opinion that presiding officers or substitutes, appointed to superintend the poll, at stations under the Ballot Act, must still possess

the qualifications prescribed by section 8 of 3 and 4 William IV., c. 76. The provisions of the Ballot Act do not appear to us to be intended to regulate the qualification of such officers in the case of municipal elections; and it is worthy of note that, whilst various portions of section 8 of the Act of William are, by section 32, and Schedule Fifth of the Ballot Act, expressly repealed, that part of the clause which relates to qualifications of polling substitutes is left intact.

Fifth.—Are the provisions of the Acts of 3 and 4 William IV., caps. 76 and 77, in regard to casting up the votes and declaring upon whom the election has fallen, still operative, to the effect of requiring these things to be done between twelve and two o'clock on the day after the election; or are these provisions superseded by the Ballot Act, and are provosts and chief magistrates left to perform these duties at their own discretion, but “as soon as practicable?”

Ans. 5. We think that, at the close of the poll, the provost or other returning officer may proceed at once to examine the ballot papers and count the votes. The poll ought not, in our opinion, to be declared until between the hours of twelve and two on the day following the election. If the examination and casting up of the votes cannot be concluded before two o'clock, the poll ought to be declared as soon as possible after these operations are completed.

Sixth.—What is the duty of the officer to whom the nomination of candidates for election falls to be made, in the event of the nomination papers being irregular and informal?

Ans. 6. As, in our opinion, the law regarding the nomination of candidates is not thereby altered,

his duty remains the same as previous to the passing of the Ballot Act.

Seventh.—What is the duty of a presiding officer in regard to a voting paper proposed to be placed in a ballot box by an elector who openly contravenes the express requirements of the Ballot Act and relative schedule?

Ans. 7. We assume that the contraventions referred to in this query may consist in the elector's violating the secrecy which the Act seems to enjoin, or in his making illegal markings upon his ballot paper. In either case, we conceive it to be the duty of the presiding officer to receive the voting paper.

Eighth.—Is a candidate who undertakes duties which any agent of his, if appointed, might undertake, subject to all the obligations, and specially those of *secrecy* to which the agent is liable; and should such candidate be required to take the statutory declaration of secrecy as a pre-requisite to being admitted to the poll or the counting of the votes?

Ans. 8. It appears contrary to the spirit of the Act that a candidate should be permitted to undertake these duties without having first made the statutory declaration of secrecy; but in the absence of any words of enactment bearing either directly or indirectly upon the matter, we cannot advise the returning or election officers to undertake the responsibility of excluding candidates who decline to make such declaration.

Ninth.—Is a voter who happens to be in a polling place when four o'clock arrives, entitled thereafter to receive a ballot paper, and to mark and deposit his vote; or if, previous to four o'clock, he has received a ballot paper, is he there-

after entitled to mark and deposit it in the ballot box ?

Ans. 9. We are of opinion that a voter, who has received a ballot paper before four o'clock, and has not unduly delayed to mark and deposit his vote, may mark and deposit the same after four o'clock ; but that no voter is entitled to receive a ballot paper after four o'clock.

Tenth.—By whom should the requisite arrangements, and specially the appointment of presiding officers and clerks, be made for municipal elections in burghs where the provost or chief magistrate falls to retire on the day on which the election takes place, and other magistrates remain in office ?

Ans. 10. In cases where it is practicable, these appointments had better be made on the day of the election, by the returning officer who enters upon office on that day. But in cases where that course is not practicable, we think that a joint appointment of presiding officers and clerks by the provost and senior bailie, confirmed by the latter upon his becoming acting chief magistrate, would be sufficient compliance with the Act.

Eleventh.—Having regard to the several points of difficulty indicated in regard to the application of the Ballot Act to the election of commissioners of police under the provisions of the Act 13 and 14 Victoria, c. 33, ("The General Police and Improvement (Scotland) Act," 1850,) and "The General Police and Improvement (Scotland) Act," 1862 :

- (1.) Must the annual election of these commissioners be hereafter made on the first Tuesday of November ; and must those commissioners who fall to retire at the next annual election (whensoever that may be), either hold office till the first

Tuesday of November, or retire from office on that day?

Ans. 11. (1.) It does not appear to us that the Ballot Act makes any change with respect to the periods at which the annual elections of these commissioners are to take place.

(2.) Must the qualification of voters for these commissioners of police still remain as provided by the General Police Acts of 1850 and 1862 as amended by the Act of 1868; or must these qualifications be the same as those of municipal and parliamentary electors? If the former, in what way can the votes of partners of companies be taken by ballot, under the provisions of the Ballot Act?

Ans. (2.) The Act does not, in our opinion, affect the qualification of persons entitled to vote at such elections. A separate roll must still be made up including the names of firms, and the partner having right to vote as representing his firm will, in our opinion, be entitled to receive a ballot paper on producing a proper mandate.

(3.) Must the nomination of candidates for election as commissioners of police, proceed henceforth as in the case of the nomination of councillors in Edinburgh, &c.; or must these nominations be conducted as heretofore, at meetings convened by the chief magistrate or sheriff, and a vote by ballot, under the provisions of the Ballot Act, only take place in the event of a poll being demanded in writing?

Ans. (3.) The nomination must, in our opinion, be made and subsequent procedure take place as in the case of Edinburgh and other burghs specified in schedule (C.) of 3 and 4 Will. IV., c. 76.

(4.) Are the provisions of section 31 of the Act 13 and 14 Victoria, c. 33, and of section 48 of the General Police and Improvement (Scotland) Act, 1862, as to disputed elections and equality of votes at elections of commissioners, still operative; or are they superseded by the Ballot Act? and must the procedure prescribed by the Act 3 and 4 Will. IV., c. 76, and amending Acts, be applicable to such cases?

Ans. (4.) This query is attended with difficulty, but we are disposed to think that the enactments in the statutes of 1850 and 1862, with regard to disputed elections and equality of votes, must be held as repealed, being of a character inconsistent with the provisions of the Ballot Act.

Twelfth.—Do the provisions of the Ballot Act apply to any elections of councillors or commissioners in burghs which are not subject to the Acts of 3 and 4 Will. IV., cap. 76 and 77, or the Act of 13 and 14 Victoria, c. 33, or the General Police and Improvement (Scotland) Act, 1862, but which are expressly provided for by local Acts, and are not appointed to be made along with the election of councillors or commissioners of police under the acts above specified, or any of them?

Ans. 12. In our opinion, they do not.

Thirteenth.—Do the provisions of the Ballot Act apply to any elections of councillors or commissioners in burghs which are subject to the Act of 13 and 14 Victoria, c. 33, or “The General Police and Improvement (Scotland) Act, 1862,” although the election of the magistrates and councillors, who are commissioners of police in these burghs, falls to

be made under special charters, or under local Acts different from the Acts of 1850 and 1862 ?

Ans. 13. We are disposed to hold that the provisions of the Ballot Act in regard to the taking of the poll, apply to the election of such magistrates and councillors as are at the same time commissioners of police under the Acts of 1850 or 1862.

The Opinion of

AND. R. CLARK.
WM. WATSON.

EDINBURGH, 9th October 1872.

[191]

APPENDIX No. XVI.

F O R M S

OF

NOTICES AND OTHER PROCEEDINGS

IN

MUNICIPAL ELECTIONS.

IN so far as the following forms are framed with reference to Edinburgh, they illustrate a case in which Trustees or Commissioners are elected in the same way and manner as Town Councillors, and as far as possible along with them, in a Burgh which is divided into wards. It will be easy to adapt these forms to all cases of Elections of Town Councillors alone, or of Town Councillors and Commissioners or Trustees together, in Burghs whether divided into wards or not.

1. *Form of Intimation by the Town Clerk of Vacancies in the Council and in a Commission or Trust to be supplied at next Election, and of the Places at which the Polls will be taken.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTIONS.

18 .

IN terms of the Act of Parliament 3 & 4 William IV., cap. 76, intituled "An Act to Alter and Amend the Laws for the Election of the Magistrates and Councils of the Royal Burghs in Scotland," "The Edinburgh Municipality Extension Act, 1856;" "The Edinburgh Roads and Streets Act, 1862;" "The Municipal Elections Amendment (Scotland) Act, 1868;" "The Municipal Elections Amendment (Scotland) Act 1870;" "The Ballot Act, 1872," and other Statutes thereanent, the TOWN CLERK of EDINBURGH hereby GIVES NOTICE, that the ANNUAL ELECTION of COUNCILLORS to Supply the Vacant Places in the Town Council, and of ONE

PERSON for each of the Thirteen Wards, who shall be a Trustee for carrying the said Edinburgh Roads and Streets Act 1862, into execution, and a Member of "The City of Edinburgh Road Trust," will, so far as may be necessary, take place on TUESDAY, the day of November next, betwixt the hours of Eight A.M., and Four o'Clock P.M., at the places after mentioned.

I. CALTON WARD.

*Polling Place—Calton Con-
vening Hall, Waterloo Place.*

To Elect two Councillors in room
of COUNCILLOR
who goes out by rotation, and
of *interim* COUNCILLOR
, and One Member of
the *City of Edinburgh Road
Trust.*

VII. ST. ANDREW'S WARD.

*Polling Place—Booth in St
Andrew's Square.*

To Elect One Councillor in room
of THE LORD PROVOST, who
goes out by rotation, and
One Member of the *City of
Edinburgh Road Trust.*

[And in like manner as regards the other Wards.]

*The Members of the City of Edinburgh Road Trust continue in
Office for One Year only.*

The TOWN-CLERK also GIVES NOTICE, That no Person can be elected to the Office either of Town Councillor or Member of the City of Edinburgh Road Trust whose name is not intimated to him, in terms of section 9 of "The Municipal Elections Amendment (Scotland) Act 1868," at the City Chambers, on or before 4 o'Clock of Thursday the —— day of ——

Every person proposed for Election to either of the said Offices should be Nominated by a separate Nomination Paper, and every Nomination Paper must be signed by two Registered Electors, as Proposer and Seconder. The Proposer and Seconder should be registered Electors in the Ward for which the Candidate is proposed.

Forms of a Nomination paper may be obtained at the Office of the Town-Clerk in the City Chambers.

The TOWN-CLERK Further GIVES NOTICE, That in the event of the number of Persons so Nominated in any of the Wards, for either of the said Offices, not exceeding the number of vacancies to be supplied in such Wards respectively, THERE WILL BE NO POLL IN THESE WARDS; and the Persons so Nominated will be declared to be Elected as Councillors of the Burgh of Edinburgh, and Members of the City of Edinburgh Road Trust respectively, in terms of "The Municipal Elections Amendment (Scotland) Act 1870."

Copies of the Register of Voters and separate Ward Lists may be had at the Town-Clerk's Office.

———, *Town-Clerk.*

CITY CHAMBERS.

EDINBURGH, October 18 .

2. *Forms of Circulars to Presiding Officers and
Polling Clerks.*

- (1.) *To ascertain whether the person to whom this circular is
sent is willing to act as a Presiding Officer.*

CITY CHAMBERS,
EDINBURGH, October 18 .

SIR,

Will you be so good as inform me, in course of post, whether it will be agreeable to you to act as a Presiding Officer at the ensuing Municipal Election, in the event of your services being required.

The Election this year takes place on Tuesday the of November, and the Poll lasts from Eight o'clock A.M. till Four o'clock P.M.

I shall be able to let you know definitely on the current, after I receive the notices prescribed by the Statute, whether your services will be required. If required, you will have to attend here on the instant, at o'clock, to take the necessary declaration of secrecy and receive your appointment.

I am,

SIR,
Your obedient Servant,

———, *Town-Clerk.*

- (2.) *To ascertain whether the person to whom this circular is
sent is willing to act as Polling Clerk.*

CITY CHAMBERS,
EDINBURGH, October 18 .

SIR,

Will you be so good as to inform me, in course of post, whether it will be agreeable to you to act as a Polling Clerk at the ensuing Municipal Election, in the event of your services being required.

The Election this year takes place on Tuesday the of November, and the Poll lasts from Eight o'clock A.M. till Four o'clock P.M.

I shall be able to let you know definitely on the current, after I receive the notices prescribed by the Statute, whether your services will be required. If required, you will have to attend here on the instant, at o'clock, to take the necessary declaration of secrecy.

I am,

SIR,
Your obedient Servant,

———, *Town-Clerk.*

3. *Form of Nomination for Election as a Councillor.*

BURGH OF EDINBURGH

MUNICIPAL ELECTION.

“The Municipal Elections Amendment (Scotland) Act 1868.”

(Schedule B.)

WE, A. B. [Here insert name and place of abode as in the Municipal Register for the Burgh.]

and B. C. [Here insert name and place of abode as in the Municipal Register for the Burgh.]

hereby propose C. D. [Here insert name and place of abode as in the Municipal Register for the Burgh.]

for election as a Councillor for the [Here insert number and name of Ward.]

Ward at the next ensuing Municipal Election in the Burgh of Edinburgh.

Given under our hand this

day of October 18

A——— B———.

B——— C———.

To ———, Esq.,

Town-Clerk of EDINBURGH.

Section 9 of the “Municipal Elections Amendment (Scotland) Act 1868,” (31 and 32 Vic., cap. 108), provides that “It shall
 “not be competent to elect any person to the office of Town
 “Councillor in any Royal or Parliamentary Burgh in Scotland,
 “unless the name of such person shall have been intimated to the
 “Town-Clerk of such Burgh, in the manner hereinafter provided,
 “on or before Four of the clock Afternoon on the Thursday
 “immediately preceding the day of Election, . . . and
 “the intimation to the Town-Clerk shall be in the form of
 “Schedule (B) hereunto annexed, or as near thereto as circum-
 “stances admit.

4. *Form of Nomination for Election as a Commissioner
or Trustee.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.—CITY OF EDINBURGH ROAD TRUST.

“The Municipal Elections Amendment (Scotland) Act, 1868.”

(Schedule B.)

WE, A. B. [Here insert name and place of abode as in the Municipal Register
for the Burgh.]

and B. C. [Here insert name and place of abode as in the Municipal
Register for the Burgh.]

hereby propose, C. D. [Here insert name and place of abode as in the
Municipal Register for the Burgh.]

for election as a member of the City of Edinburgh Road Trust
for the [Here insert number and name of Ward.]

Ward at the next ensuing Municipal Election in the Burgh of
Edinburgh.

Given under our hand this

day of October 18

A——— B———.

B——— C———.

To ———, Esq.,

Town-Clerk of EDINBURGH.

Section 9 of the “Municipal Elections Amendment (Scotland) Act 1868,” (31 and 32 Vic., cap. 108), provides that “It shall not
“be competent to elect any person to the office of Town Councillor in
“any Royal or Parliamentary Burgh in Scotland, unless the name
“of such person shall have been intimated to the Town-Clerk of
“such Burgh, in the manner hereinafter provided, on or before
“Four of the clock Afternoon on the Thursday immediately pre-
“ceding the day of Election, . . . and the intimation to the Town
“Clerk shall be in the form of Schedule (B.) hereunto annexed, or
“as near thereto as circumstances admit.”

Section 4 of the Municipal Elections Amendment Scotland Act, 1870, (33 and 34 Vic., cap. 92), *inter alia*, provides that “Where

“by any Act of Parliament it is provided that any Commissioners
 “or Trustees under such Act are to be elected by the municipal
 “Electors, or at the same time or along with the Town Council-
 “lors of any Burgh, the provisions of the Election Acts shall be
 “applicable to every such election of Commissioners or Trustees.”

5. *Form of Intimation by the Town-Clerk of the names of
 Persons nominated for Election as Councillors, and of the
 Wards in which a Poll will not take place.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTIONS.

II

In terms of “The Municipal Elections Amendment (Scotland)
 Act, 1868,” I hereby GIVE NOTICE that I have received Intimation
 that the following Persons are proposed for Election as Councillors
 in this Burgh at the Municipal Election on Tuesday next :—

I. CALTON WARD.

VIII. CANONGATE WARD.

Names of Candidates.	Places of Abode of Candidates.	Names of Pro- posers and Seconders.	Places of Abode of Proposers and Seconders.	Names of Candidates.	Places of Abode of Candidates.	Names of Pro- posers and Seconders.	Places of Abode of Proposers and Seconders.

[And in like manner as regards the other Wards.]

And I further GIVE NOTICE, in terms of the "The Municipal Elections Amendment (Scotland) Act, 1870," That in respect the number of persons proposed for Election as Councillors in the _____ Ward, and in the _____ Ward, does not exceed the number of vacancies to be supplied in the said Wards, THERE WILL BE NO POLL in the said Wards; and the persons so proposed will, on the day appointed for declaring the Election, be declared to be Councillors of the Burgh.

Given under my hand at Edinburgh, this _____ day
of _____ 18 _____.

_____, *Town-Clerk.*

6. *Form of Intimation by the Town-Clerk of the names of persons proposed for election as Commissioners or Trustees, and of the Wards in which a Poll will not take place.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTIONS.

18 _____

IN terms of "The Municipal Elections Amendment (Scotland) Act 1868," and "The Municipal Elections Amendment (Scotland) Act 1870," I hereby GIVE NOTICE that I have received Intimation that the following Persons are proposed for Election as Trustees for carrying "The Edinburgh Roads and Streets Act 1862" into execution, and Members of "The City of Edinburgh Road Trust," at the Municipal Election on Tuesday next:—

I. CALTON WARD. VIII. CANONGATE WARD.

Names of Candidates.	Places of Abode of Candidates.	Names of Proposer and Seconder.	Places of Abode of Proposer and Seconder.	Names of Candidates.	Places of Abode of Candidates.	Names of Proposer and Seconder.	Places of Abode of Proposer and Seconder.

[And in like manner with reference to the other Wards.]

Given under my hand at Edinburgh, this day of 18
_____, Town-Clerk.

I am, SIR,
Your obedient Servant,
_____, *Town-Clerk.*

8. *Form of Appointment of a Presiding Officer and Clerks
by a Provost or Chief Magistrate who does not retire
from office at the ensuing Municipal Election.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

18

——— Ward.

I, the Right Honourable A. B., Lord Provost [*or B. C., Chief Magistrate, as the case may be*] of the City of Edinburgh, in virtue of the powers vested in me by the Act 3 and 4 William Fourth, Chapter 76, "The Edinburgh Municipality Extension Act, 1856," "The Edinburgh Roads and Streets Acts, 1862," "The Municipal Elections Amendment (Scotland) Act, 1868," "The Municipal Elections Amendment (Scotland) Act, 1870," and "The Ballot Act, 1872," DO HEREBY APPOINT C. D. [*insert full name and designation*], to be Presiding Officer to officiate and preside at the Polling Station, Number _____, in the Polling Place for the above-named Ward, at the Election of _____ Councillor and a Member of the City of Edinburgh Road Trust, on the first TUESDAY of November One thousand eight hundred and _____; and I ALSO APPOINT E. F. and F. G. [*insert full names and designations*], to officiate as Clerks in the said Polling Station at the said Election. In witness whereof, I have subscribed these presents, written, in so far as not printed, by
Clerk to _____, Town-Clerk of Edinburgh,
at Edinburgh the _____ day of _____,
in the year one thousand eight hundred and _____, before
these witnesses,

A——— B———,

O——— P———, *Witness.*

Lord Provost.

Q——— R———, *Witness.*

9. *Form of Appointment of a Presiding Officer and Clerks by a Provost or Chief Magistrate who retires at the ensuing Municipal Election, and of the Magistrate who, on the retirement of the Provost or Chief Magistrate, will become Acting Chief Magistrate of the Burgh, and Returning Officer in the Election.*

BURGH OF _____

MUNICIPAL ELECTION.

18

_____ Ward.

WE, A. B., Provost [*or Chief Magistrate, as the case may be*], of the Burgh of _____ and C. D., one of the Magistrates of the said Burgh, CONSIDERING that I, the said A. B., at present hold the office of Provost [*or Chief Magistrate*] aforesaid, but that I retire from the said office on the _____ day of November next, when I, the said C. D., will become the acting Chief Magistrate of the said Burgh until an election of Provost [*or Chief Magistrate*] takes place : AND CONSIDERING that on the said _____ day of November next, the duty of Returning Officer in the ensuing Municipal Election in the said Burgh will devolve upon me : AND FARTHER CONSIDERING that it is expedient that arrangements should now be made for conducting the said election, and that we should, in so far as our rights and duties respectively extend, concur in making these arrangements, and specially in making the appointments underwritten : THEREFORE we, for our respective rights, and in performance of the duties conferred on us respectively, under and by virtue of the Act 3 & 4 William Fourth, Chapter Seventy-Sixth, “The Municipal Elections Amendment (Scotland) Act, 1868,” “The Municipal Elections Amendment (Scotland) Act, 1870,” “The Ballot Act, 1872,” and [*here enumerate the Local or General Acts, if any, under which elections of Trustees or Commissioners take place in the particular Burgh*] do HEREBY APPOINT E. F. [*insert full name and designation*] to be Presiding Officer to officiate and preside at the Polling Station, Number _____, in the Polling Place for the above-named Ward, at the election of Councillor _____ and a Commissioner [*or Trustee, as the case may be.*] [*Here specify the Commission or Trust to which the election falls to be made, if any*], on the first Tuesday of November One thousand eight hundred and _____ ; and we ALSO APPOINT G. H. and

J. K. [*insert full names and designations*] to officiate as Poll Clerks in the said Polling Station, at the said Election. In witness whereof, we have subscribed these presents, written, in so far as not printed, by

to _____ Town-Clerk of _____, at _____
the _____ day of _____ in the year One thousand
eight hundred and _____, before these witnesses,

A_____ B_____,

O_____ P_____, *Witness.* *Provost [or Chief Magistrate.]*

Q_____ R_____, *Witness.*

C_____ D_____,

Magistrate.

10. *Form of Appointment by a Candidate of a Person to Act as his Agent, and to attend the Poll and the Counting of the Votes.*

I, B. C. [*design him as in his nomination paper*], having, under the provisions of "The Municipal Elections Amendment (Scotland) Act, 1868," been proposed for election as a Councillor of the Burgh of Edinburgh for the _____ Ward [*or as a member of the City of Edinburgh Road Trust for the _____ Ward of the said City*], Do HEREBY APPOINT C. D. [*design him*] to act as my Agent in the said Election, and as such, to attend the poll in the Polling Station [*or in the several Polling Stations, as the case may be*] in the said Ward, and also to attend the counting of the votes given in the said Ward; with all the powers and rights which belong to, and are conferred upon, agents of candidates by "The Ballot Act, 1872." In witness whereof, I have subscribed these presents, written, in so far as not printed, by

Clerk to

at Edinburgh, the _____ day of _____
November, in the year One thousand eight hundred and _____,
before these witnesses,

B_____ C_____ .

D_____ E_____ *Witness.*

E_____ F_____ *Witness.*

11. *Form of Card to be given to Agent after he has taken the Declaration of Secrecy.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

——— Ward.

Mr
has been appointed Agent for one or more of the Candidates for Election, and is entitled to be admitted to the Polling Station for the above Ward.

COUNCIL CHAMBERS,
November 18 .

Lord Provost [*or Chief Magistrate*]
of the City of Edinburgh [*as the*
case may be].

12. *Statutory Declaration of Secrecy.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

18 .

Section 4 of "The Ballot Act 1872" enacts as follows:—

"4. Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark, and no such officer, clerk, or agent, and no person whomsoever, shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.

"Every person who acts in contravention of the provisions of this

section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour."

STATUTORY DECLARATION OF SECRECY.

(1.) *By the Returning Officer.*

I solemnly Promise and Declare that I will not, at this Election for the Burgh of Edinburgh, do anything forbidden by Section Four of "The Ballot Act, 1872," which has been read to me.

A *B*, Lord
Provost [*or Chief Magistrate*]
of the City of Edinburgh [*as*
the case may be.]

Declared at Edinburgh, this
day of 18

Before me,

C. D., J.P. for the
City or County of the City
of Edinburgh.

(2.) *By Presiding Officers.*

We solemnly Promise and Declare that we will not, at this Election for the Burgh of Edinburgh, do anything forbidden by Section Four of the Ballot Act, 1872, which has been read to us.

Declared at Edinburgh, this day *X C. D.*
of 18 *X E. F.*

Before me,

E *F*, Lord
Provost [*or Chief Magistrate*]
of the City of Edinburgh [*or*
J. P. for the City or County of
the City of Edinburgh, as the
case may be.]

(3.) *By Assistants to the Returning Officer.*

[*The above Declaration will be taken by Assistants in the same way as by Presiding Officers.*]

(4.) *By Clerks.*

(5.) *By Agents of Candidates.*

[*The above Declaration will be taken by Clerks and Agents in the same way as by Presiding Officers.*]

13. *Forms of Circulars to Presiding Officers and Polling Clerks.*(1.) *Transmitting Appointment to a Presiding Officer.*

CITY CHAMBERS,
EDINBURGH, November 18 .

SIR,

Herewith you will receive your appointment to act as a Presiding Officer in the Municipal Election to-morrow. You will see from it the Polling Place and Polling Station to which you have been assigned. The polling place is at . You will find the ballot papers, stamping instrument, ballot box, and all the other requisites for conducting the election in the Polling Station at which you are to preside ; and I am to beg the favour of your being in your place at the Station at a quarter to Eight o'clock to-morrow morning. The Polling Clerks assigned to you have been instructed to report themselves to you at that hour.

I am,

SIR,

Your most obedient Servant,

———, *Town-Clerk.*

(2.) *Intimating to a Polling Clerk the Ward to which he has been assigned.*

CITY CHAMBERS,
EDINBURGH, November 18 .

SIR,

I beg to inform you that you are appointed to act as a Polling Clerk in the Polling Station, No. in the Polling Place for the Ward. The Polling Place is at , and I have to request that you will be in attendance, and report yourself to the Presiding Officer, to-morrow morning at a quarter to Eight o'clock.

I am,

SIR,

Your most obedient Servant,

———, *Town-Clerk.*

14. *Form of Confirmation of the Appointments of Presiding Officers and Polling Clerks, to be executed on the morning of the day of Election by the Magistrate or other person who is to be Returning Officer in the Election.*

BURGH OF ———.

MUNICIPAL ELECTION.

18 .

———Ward.

I, C. D., Acting Chief Magistrate of the Burgh of
CONSIDERING that on the day of November current, A. B.,
as then Provost, and I, as one of the Magistrates of the said
Burgh, appointed the following persons to be Presiding Officers
to officiate and preside at the several Polling Places in the various
Wards of the Burgh as follows, viz. :—E. F. [*insert full name and
designation*] at the Polling Station, Number , in the Polling
Place for the first Ward. G. H. [*insert full name and
designation*] at the Polling Station, Number , in the Polling
Place for the second Ward.

[*And so on giving the names of all the Presiding Officers, and the
Polling Stations to which they were severally appointed*].

AND ALSO the following persons to officiate as Poll Clerks in the
several Wards at the said election, *videlicet*,—

[*Here insert names and designations of persons appointed, and the
Wards to which they were assigned*].

AND CONSIDERING that the said A. B. has ceased to hold the said
office of Provost, and that I am now the Acting Chief Magistrate
of the Burgh, and as such Returning Officer in the said Election,
and that it is proper, in order that all doubt or question may be
obviated as to the said appointments and the several arrange-
ments which may have been made by the said A. B. during his
tenure of office as Provost aforesaid, in view of and with refer-
ence to the said election, THEREFORE I do hereby, as Acting Chief
Magistrate of the said Burgh and returning Officer afore-
said, RATIFY and CONFIRM the said appointments and all the
arrangements above referred to in every respect, and I DE-
CLARE the same to be as valid and effectual as if they had
been made by me as Returning Officer aforesaid. AND FARTHER,
and the more effectually to remove all doubts or question in the
premises, I do hereby OF NEW APPOINT the several persons above
named and designed to be Presiding Officers and Poll Clerks
respectively at the several Polling Stations to which they have

been respectively assigned, in the election of Councillors and Commissioners as aforesaid. IN WITNESS WHEREOF I have subscribed these presents, written, in so far as not printed, by

_____, Clerk to _____, Town-Clerk
of _____, at _____ the
day of _____, in the year One thousand eight
hundred and _____, before these witnesses. . . .

C_____ D_____.

O_____ P_____, *Witness.*

Q_____ R_____, *Witness.*

15. *Forms of Placards to be printed in Conspicuous Characters, and placarded outside every Polling Station, and in every Compartment of every Polling Station.*

(1.) *Directions for the Guidance of the Voter in Voting in a Ward in which two Vacancies have to be supplied.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

DIRECTIONS FOR THE GUIDANCE OF THE VOTER IN VOTING.

The Voter may vote for Two candidates.

The Voter will go into one of the compartments, and, with the pencil provided in the compartment, *place a cross on the Right hand side, opposite the name of each candidate for whom he votes, thus X*

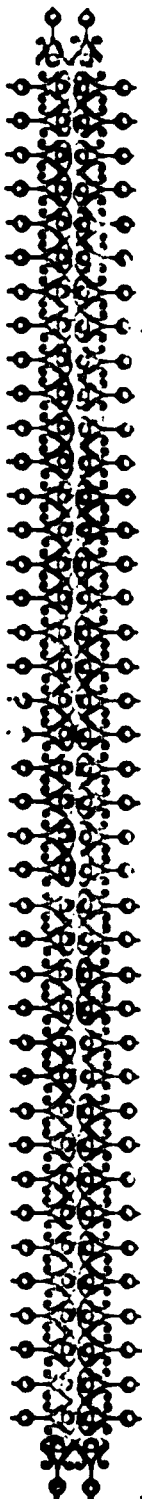
The Voter will then fold up the Ballot Paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, *put the paper into the ballot box, and forthwith quit the polling station.*

If the Voter inadvertently spoils a Ballot Paper, he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper.

If the Voter votes for more than Two candidates, or places any mark on the paper by which he may be afterwards identified, his Ballot Paper will be void, and will not be counted.

If the Voter takes a Ballot Paper out of the polling station, or deposits in the ballot box any other paper than the one given him by the officer, he will be guilty of a misdemeanour, and be subject to imprisonment for any term not exceeding six months, with or without hard labour.

Example of Ballot Paper.

Counter-foil.		1	ANDERSON. (William Anderson, of 3 Waterloo Place, Edinburgh.)	×
No.		2	DAVIS. (Robert Davis, of 16 Leith Street, Edinburgh.)	
		3	MITCHELL. (George Mitchell, of 34 Regent Terrace, Edinburgh.)	
		4	ROBERTSON. (Frederick Thomas Robertson, of 24 Windsor Street, Edinburgh.)	×
		5	WILLIAMSON. (Alexander Williamson, of 12 Greenside Street, Edinburgh.)	
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[If, for the sake of illustration, the Voter desires to Vote for Anderson and Robertson, the supposed Candidates in the example of a Ballot Paper here given, he will put a cross opposite their names, as is done in the above Form, making no other mark of any kind on the Ballot Paper.]

[NOTE.—If a Polling Place is divided into several Polling Stations to facilitate Voting, each Polling Station will be numbered, and have its number indicated in conspicuous characters. And if the arrangements for voting in each Polling Station have reference to the letters with which the surnames of the Voters begin, the following

Placard, printed in large characters, should be put up outside every Polling Place and Station, and in every Polling Station.]

(2.) *Form of Placard intimating arrangements for Polling.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

In order to facilitate and expedite the Voting, **FOUR POLLING STATIONS** have been provided for this Ward, Numbered respectively **ONE, TWO, THREE, and FOUR.**

Electors whose Surnames begin with Letters from **A** to **E** both inclusive, will Vote at Polling Station No. **ONE.**

Electors whose Surnames begin with Letters from **F** to **L** both inclusive, will Vote at Polling Station No. **TWO.**

Electors whose Surnames begin with Letters from **M** to **P** both inclusive, will Vote at Polling Station No. **THREE.**

Electors whose Surnames begin with Letters from **Q** to **Z** both inclusive, will vote at Polling Station No. **FOUR.**

———, *Town-Clerk.*

(3.) *Form of Placard to be posted up above each Polling Station with reference to the preceding Placard.*

POLLING STATION No. I.

Electors whose surnames begin with Letters

A to E

vote at this Polling Station.

—————

16. *Form of Statutory Declaration that the Person claiming to Vote is the Individual described in the Municipal Register.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

“The Municipal Elections Amendment (Scotland) Act 1868.”

Schedule (A.)

——— Ward

I, A. B., declare that I am the Individual described in the Register now in force for the Burgh of Edinburgh as [*Here insert Description in the same words as in the Register*], and that I have not already voted at this election.

× A——— B———.

[If the declarant alleges he cannot write, and affixes his mark to the declaration, the presiding officer will fill up and subscribe the following attestation:—]

At Edinburgh, this day of November 18 .—I, the undersigned, being the presiding officer for the Polling Station No. , in the Polling Place for the Ward of the Burgh of Edinburgh, do hereby certify that the above declaration, having been first read to the above named A. B., who declared he could not write, was signed by him in my presence with his mark.

C——— D———

Presiding Officer aforesaid.

Sect. 8 of “The Municipal Elections Amendment (Scotland) Act 1868,” 31 and 32 Vic., cap. 108, provides that “At every future Election of a Town Councillor for any Royal or Parliamentary Burgh, the Register of Voters made up and completed as aforesaid shall be deemed, and taken to be, conclusive evidence that the persons therein named continue to have the Qualifications which are annexed to their names respectively in the Register in force at such Election; and such persons shall not be required to take any Oath or solemn Affirmation, but they may be required to make a declaration in the form of the Schedule (A.) to this Act annexed.”

17. *Form of Statutory Declaration of Inability to Read, referred to in Rule 26 of Schedule First of “The Ballot Act 1872.”*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

Declaration of Inability to Read.

I, B. C. of , being numbered on the Register of Voters for the Burgh of Edinburgh, do hereby declare that I am unable to read.

× his mark.

I, the undersigned, being the Presiding Officer for the Polling Station, No. , in the Polling Place, for the Ward of the Burgh of Edinburgh, do hereby certify that the above declaration having been first read to the above named , was signed by him in my presence with his mark.

C——— D———

Presiding Officer aforesaid.

Edinburgh, day of November 18 .

18. *Form of Tendered Votes List, referred to in Rule 27 of Schedule First of “The Ballot Act 1872.”*

BURGH OF EDINBURGH.
MUNICIPAL ELECTION.

18 .
—— Ward. Polling Station No. .
Tendered Votes List.

Name of Voter.	Number on Register.

19. *Form of List of Votes marked by the Presiding Officer, referred to in Rule 26 of Schedule First of “The Ballot Act 1872.”*

BURGH OF EDINBURGH.
MUNICIPAL ELECTION.

18 .
—— Ward. Polling Station No. .

I.—List of Votes marked by the Presiding Officer.

Name of Voter.	Number on Register.	Reason why Vote Marked.

——, *Presiding Officer.*

20. *Form of Statement of Number of Voters whose votes are marked by the Presiding Officer, referred to in Rule 29 of Schedule First of "The Ballot Act 1872."*

BURGH OF EDINBURGH.
MUNICIPAL ELECTION.

18 .

—— Ward. Polling Station No. .

II.—Statement of Number of Voters whose Votes are marked by the Presiding Officer.

Number of Votes Marked.	Physical Incapacity.	Unable to read.	Total.

——, *Presiding Officer.*

—————

21. *Form of Ballot Paper Account, referred to in Rule 30 of Schedule First of "The Ballot Act 1872."*

BURGH OF EDINBURGH.
MUNICIPAL ELECTION.

18 .

BALLOT PAPER ACCOUNT.

Statement made by , Presiding Officer at the
Polling Station No. in the Polling Place, for the
Ward of the Burgh of Edinburgh, in terms of the Ballot Act
1872, Rule 30.

Number of Ballot Papers Entrusted to the Presiding Officer.	Ballot Papers in Ballot Box.	Unused.	Spoilt.	Total.	TENDERED BALLOT PAPERS.				
					Number En- trusted to Pre- siding Officer.	Used.	Unused.	Spoilt.	Total.

_____, *Presiding Officer.*

To the Right Hon.

_____, Lord Provost of Edinburgh.

Or to _____, Esq., *Acting Chief Magistrate
of the City of Edinburgh.*

Returning Officer for the Burgh of Edinburgh.

22. *Form of Appointment of Persons to act as Assistants
and Clerks in counting the Votes.*

I, the Right Honourable A. B., Lord Provost [or I, B. C., *acting
Chief Magistrate*] of the city of Edinburgh, in virtue of the powers
vested in me by the Act 3 and 4 William Fourth, Chapter Seventy-
six, "The Edinburgh Municipality Extension Act, 1856," "The
"Edinburgh Roads and Streets Acts, 1862," "The Municipal
"Elections Amendment (Scotland) Act 1868," "The Municipal
"Elections Amendment (Scotland) Act, 1870," and "The Ballot
"Act, 1872," HEREBY APPOINT C. D. [*here design him*], E. F. [*here
design him*], G. H. [*here design him*], and F. F. [*here
design him*], to assist me in counting the votes given to the
respective candidates for election to the offices of Councillor and
Member of the the City of Edinburgh Road Trust, or either of
them, in the several Wards of the city in which the election to
the said offices, or either of them, took place this day; AND I ALSO
APPOINT G. H., I J., K. L., and M. N. [*insert full names and
designations*], to act as Clerks in counting the said votes. IN
WITNESS WHEREOF, I have subscribed these presents, written, in
as far as not printed, by

Clerk to

Town-Clerk of Edinburgh,

at Edinburgh the

day of

in the year one thousand eight hundred and

, before
these witnesses,

O _____ P _____, *Witness*

Q _____ R _____, *Witness.*

A _____ B _____,

Lord Provost.

23. *Form of Minute by the Candidates or their Agents consenting to the Votes being counted at any time the Returning Officer may fix.*

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

187 .

WE, the Candidates or Agents for Candidates subscribing, hereby consent, for our respective rights and interests, to the Returning Officer at the Municipal Election for the year 187 proceeding with the counting of the votes given at the poll for the several candidates for election as Councillors and Trustees for carrying "The Edinburgh Roads and Streets Act 1862" into execution, at such time as he may consider most expedient, without reference to the exclusion of the hours between seven o'clock at night and nine o'clock on the succeeding morning, contained in No. 35 of the Rules forming Schedule First of "The Ballot Act 1872."

A——— B———, *Candidate.*
 B——— C———, *Agent for C. D., Candidate.*
 E——— F———, *Candidate.*

24. *Form of Intimation to the Candidates, or to the Agents of Candidates, of the Time and Place at which the Lord Provost or Chief Magistrate will begin to Count the Votes.*

CITY CHAMBERS,
 EDINBURGH, November 18 .

SIR,—I hereby intimate to you, that I will begin ———
 ——— at ——— o'clock ——— to count the Votes given at
 the Poll ——— for the several Candidates for election as Councillors
 and Members of the City of Edinburgh Road Trust, in the several
 Wards in which the election is contested.

I am, SIR,

Your most obedient Servant,

To K. J., Esq.,
 Solicitor,
 26 George Street, Edinburgh,
 Agent for O. N.,
 One of the Candidates for election
 as a Councillor [*or Member of the*
City of Edinburgh Road Trust.]

———, *Lord Provost,*
 [*or Chief Magistrate,*
as the case may be.]

22. *Minute of Proceedings at the Counting of the Votes.***BURGH OF EDINBURGH.****MUNICIPAL ELECTION.**

187 .

I.—CALTON WARD.

At Edinburgh, the
day of November 187 .

*Present,—A. B., Lord Provost [or Chief Magistrate as the
case may be.]*

B. C., C. D., E. F., G. H.,	}	<i>insert designation in each case,</i>	{	Assistants appointed by the said Lord Provost [or Chief Magistrate as the case may be.]
--------------------------------------	---	---	---	--

J. K., L. M., N. O., P. Q., R. S.,	}	<i>insert designation in each case,</i>	{	Clerks appointed by the said Lord Provost [or Chief Magistrate as the case may be.]
--	---	---	---	---

T. U., [*insert designation*], one of the candidate for election
as a Councillor for the First, Calton Ward.

V. W., [*insert designation*], one of the candidates for election
as a Councillor for the said Ward, and B. A., [*insert
designation*], his Agent.

X. Y. [*insert designation*], agent for D. C., one of the candi-
dates for election as a Councillor for the said Ward.

*[Here will follow the names of candidates for election as Mem-
bers of the City of Edinburgh Road Trust, or their Agents who
may be present.]*

Appeared H. G., Council Officer, who declared that at
o'clock on the afternoon of yesterday, the instant, he had put into
the General Post Office in Edinburgh a letter, the postage of which
was prepaid, addressed by the said A. B., Lord Provost [*or Chief
Magistrate*] aforesaid, to each of K. J., [*design him as so addressed*],
and M. L., [*design him as so addressed*], intimating to the said K.
J., as agent for O. N., [*insert designation*], and to the said M. L.,

as agent for Q. P., [*insert designation*], the said O. N. and Q. P. being both candidates for election as Councillors in the said First, Calton Ward,—that at o'clock to-day, the said A. B., Lord Provost [*or Chief Magistrate*] aforesaid, would begin to count the votes given at the poll yesterday for the several candidates for election as Councillors and Members of the City of Edinburgh Road Trust in the several Wards in which the election was contested.

All the persons present, with the exception of V. W. and X. Y. aforesaid, having previously made the declaration of secrecy prescribed by "The Ballot Act 1872," the said V. W. and X. Y. made the said declaration of secrecy in the presence of the Lord Provost [*or Chief Magistrate*].

The said Lord Provost [*or Chief Magistrate*] then proceeded to examine the several sealed packets which had been delivered to him by the respective presiding officers, who had officiated at the polling place for the First, Calton Ward, when the seals were found to be unbroken. Thereupon the said Lord Provost [*or Chief Magistrate*] caused the ballot boxes which had been used at the said Polling Places to be opened, and the ballot papers therein to be counted, in conformity with the directions in Rule 34 of Schedule First of The Ballot Act, when it was found that each of the said boxes contained the following numbers of ballot papers :—

The box used by the Presiding Officer at						
Polling Place No. I.,	.	.	.	.	.	.
Polling Place No. II.,	.	.	.	.	.	.
Polling Place No. III.,	.	.	.	.	.	.
Polling Place No. IV.,	.	.	.	.	.	.
Total number of Ballot Papers,						

Thereafter the whole of the ballot papers in the said boxes were mixed together, and the counting of the votes was proceeded with, when it was found that the following number of votes had been given for the following candidates for election as Councillors for the Ward :—

	Votes .					
For V. W.,	.	.	.	.	.	.
For O. N.,	.	.	.	.	.	.
For T. U.,	.	.	.	.	.	.
For Q. P.,	.	.	.	.	.	.
For D. C.	.	.	.	.	.	.

and the following number of votes for the following candidates for election as member of the City of Edinburgh Road Trust,—

For F. E.,	}					Votes.
For H. G.		.	.	.	.
For K. I.,		.	.	.	.

Of the ballot papers found in the said ballot boxes, there were rejected by the said Lord Provost [*or Chief Magistrate*] as invalid, and not counted by him in the total votes given above on account of—

1. Want of official mark,
2. Voting for more candidates than entitled to,
3. Writing or mark by which voter could be identified,
4. Unmarked or void for uncertainty,

Total number of ballot papers rejected,

On all the ballot papers so rejected as invalid, the said Lord Provost [*or Chief Magistrate*] endorsed the word “rejected,” adding to the endorsement the words “rejection objected to,” whenever an objection was made to his decision by any candidate or by the agent of any candidate.

Upon the completion of the counting of the said ballot papers, the said Lord Provost [*or Chief Magistrate*] sealed up in separate packets the whole counted and rejected ballot papers.

Thereafter the said Lord Provost [*or Chief Magistrate*] proceeded, in the presence of the candidates and their agents foresaid, to verify the ballot paper account given by each presiding officer who had officiated at the Polling Places for the said Ward,—this being done by comparing it with the number of ballot papers recorded by him as aforesaid, and the unused and spoilt ballot papers in his possession, and the tendered votes list. Having found the said ballot paper account to be correct, each of the packets which had been opened for the purpose of examination and verification aforesaid was resealed.

The counting of the votes having thus been completed, the several packets, containing all the ballot papers connected with the election in the said Ward, together with the ballot paper accounts, the tendered votes lists, the lists of votes marked by the several presiding officers, the statements relating thereto, the declarations of inability to read, and packets of counterfoils, and marked copies of registers sent by each presiding officer, had endorsed upon them a description of their several contents and the date of the election to which they relate. Thereafter the same were delivered by the said Lord Provost [*or Chief Magistrate*] to _____, Town-Clerk of Edinburgh, to be by him kept among the records of the burgh, in terms of “The Ballot Act 1872.”

Lord Provost [*or Chief Magistrate, as the case may be.*]

[A similar minute, mutatis mutandis, will be requisite for each ward in which a contest takes place.]

25-A. *Form of Tabulating Sheet.*

BURGH OF _____

MUNICIPAL ELECTION.

18 .

_____ Ward

Sheet No. _____

No.	A	B	C	D	E	TOTALS.
	1	2	3	4	5	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
* And so on down to and including No. 50.						
TOTALS.						

Abstract and Summation made and checked by

25-B. *Form of Abstract of Tabulating Sheet.*

BURGH OF_____

MUNICIPAL ELECTION.

18 .

_____Ward.

Sheet No._____

No.	A	B	C	D	E	TOTALS.
	1	2	3	4	5	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
* And so on down to and including No. 50.						

Results of Votes abstracted and tabulated by

Summations made and checked by

_____	_____
_____	_____

26. *Form of Certificate by the Town-Clerk as to previous Steps of Procedure.*

CITY CHAMBERS,
EDINBURGH, November 18 .

I, _____, TOWN-CLERK OF EDINBURGH, acting in the execution of the Acts after specified,—viz., 3 and 4 William the Fourth, chapter 76, “The Edinburgh Municipality Extension Act, 1856,” “The Edinburgh Roads and Streets Act, 1862,” “The Municipal Elections Amendment (Scotland) Act, 1868,” “The Municipal Elections Amendment (Scotland) Act 1870,” and “The Ballot Act, 1872,”—Do HEREBY CERTIFY that under and in terms of the said Act 3 and 4 William the Fourth, chapter 76, section 8, and of the said “Edinburgh Municipality Extension Act, 1856,” section 16, I gave notice on the _____ day of October 18____ that the annual Election of Councillors to supply the vacant places in the Town Council, and of one person for each of the Thirteen Wards, who should be a Trustee for carrying the said “Edinburgh Roads and Streets Act, 1862,” into execution, and a member of the City of Edinburgh Road Trust, would, so far as might be necessary, take place on Tuesday, the _____ day of November current, betwixt the hours of eight o’clock A.M. and four o’clock P.M., at the places specified in the said notice; WHICH NOTICE was affixed to or near the door of the Church of St Giles, and was also inserted, at least once, in one of the Edinburgh newspapers ten days at least previous to the first Tuesday of November current, being the day appointed by the said Act 3d and 4th William the Fourth, chapter 76, and subsequent Acts of Parliament, for the Municipal Election in the Burgh of Edinburgh; AND I DO CERTIFY that on or before four o’clock afternoon on Thursday, the _____ day of November current, being the Thursday immediately preceding the day appointed for the said Municipal Election, I received intimation that the persons named and designed in the schedule hereto appended, marked No. I., and subscribed by me with reference hereto, were proposed for election as Councillors in this Burgh for the respective Wards therein specified; AND ALSO that I received intimation that the persons named and designed in the schedule hereto appended, marked No. II., and subscribed by me with reference hereto, were proposed for election as Trustees for carrying the said “Edinburgh Roads and Streets Act, 1862,” into execution, and members of the City of Edinburgh Road Trust for the respective Wards therein specified. I FURTHER CERTIFY, that on or before Friday the _____ instant, being the Friday immediately preceding such Election, I caused public notices to be given as provided by the said “Municipal Elections (Scotland) Amendment Act, 1868,” of the names of all persons so intimated to me; that such notices were

affixed to the doors of the Town Hall or Council Chambers and of the Parish Churches in the Burgh, and that the said notices were also advertised in one or more newspapers published and circulating within the Burgh; AND I DO FURTHER CERTIFY, that, in terms of the said "Municipal Elections Amendment (Scotland) Act, 1870," I gave public notice, as directed by the said "Municipal Elections Amendment (Scotland) Act, 1868," that in respect the number of persons proposed for Election as Councillors in the

Ward, Ward, and Ward, did not exceed the number of vacancies to be supplied in the said Wards, there would be no poll, and that the persons so proposed would, on the day appointed for declaring the Election, be declared to be elected Councillors of the Burgh. Also, that in respect the number of persons proposed for Election as Trustees for carrying the said "Edinburgh Roads and Streets Act 1862" into execution, and members of the City of Edinburgh Road Trust in the Ward, Ward Ward, Ward, did not exceed the number of vacancies to be supplied in the said Wards, there would be no poll, and that the persons so proposed would, on the day appointed for declaring the Election, be declared to be elected Trustees and members foresaid.

———, *Town-Clerk.*

SCHEDULE No. I.

I.—CALTON WARD.

A. B. 36 Pilrig Street.

II.—BROUGHTON WARD.

B. C. 1 Leopold Place.
C. D. 29 Clarence Street.

[*And in like manner as regards the other Wards.*]

———, *Town-Clerk.*

SCHEDULE No. II.

I.—CALTON WARD.

E. F. 12 Broughton Street.

II.—BROUGHTON WARD.

G. H. 13 Warriston Crescent.

[*And in like manner as regards the other Wards.*]

———, *Town-Clerk.*

[In the event of the Town-Clerk not receiving intimation of the names of persons proposed for election sufficient to supply the vacancies in any burgh, or in any ward where the burgh is divided into wards; Or, in the event of fewer persons being proposed for election than there are vacancies to be supplied, he will add the following paragraph to the above Certificate.]

I DO FURTHER HEREBY CERTIFY, that I received no intimation
of the name of any person proposed for election as a Councillor
to supply the vacancy in the Ward.

or.

I DO FURTHER HEREBY CERTIFY, that although two vacancies have to be supplied in the Ward, I received information of the name of only one person proposed for election as a Councillor for the said Ward.

27. Declaration by the Lord Provost or Chief Magistrate as to Persons elected Councillors and Commissioners or Trustees who are elected with the Town Councillors.

COUNCIL CHAMBERS,
EDINBURGH, *November 18* .

I, THE RIGHT HONOURABLE
LORD PROVOST [or I, *acting Chief Magistrate, as the
case may be*] OF THE CITY OF EDINBURGH, having, in terms of the
Act 3 and 4 Will. IV., cap. 76, "The Edinburgh Municipality Extension Act 1856," "The Edinburgh Roads and Streets Act, 1862,"
"The Municipal Elections Amendment (Scotland) Act, 1868," "The
Municipal Elections Amendment (Scotland) Act, 1870," and "The
Ballot Act, 1872," opened the several Ballot Boxes used in the Municipal
Elections for the different Wards where the number of persons
proposed for election exceeded the number of vacancies to be
supplied, and having ascertained the result of the Poll by counting
the votes given to each Candidate in each of the said Wards, in
terms of the provisions of the said Ballot Act; and having heard
the foregoing Certificate by the Town Clerk read; declare that the
election has fallen upon the following gentlemen as Councillors and
Trustees for carrying the said "Edinburgh Roads and Streets Act,
1862," into execution, and members of the City of Edinburgh Road
Trust respectively, namely—

I.—CALTON WARD.

COUNCILLOR.

A. B. [*Here design him*], re-elected, having gone out by rotation, _____ votes.

MEMBER OF ROAD TRUST.

B. C. [Here design him.] ——— votes.

II.—BROUGHTON WARD.

COUNCILLOR.

E. F. [Here design him], re-elected, having gone out by rotation, ——— votes.

MEMBER OF ROAD TRUST.

G. H. [Here design him.] ——— votes.

III.—ST BERNARD'S WARD.

COUNCILLOR.

J. K. [Here design him], in room of Councillor L. M., who retires by rotation, ——— votes.

MEMBER OF ROAD TRUST.

N. O. [Here design him.] ——— votes.

AND in terms of the before-recited Acts, I HEREBY DIRECT NOTICE to be given to the before-named Councillors to appear in the Council Chambers to-morrow, at twelve o'clock noon, when they shall severally declare whether they accept or decline accepting the office of Councillor: FURTHER, in terms of the said "Edinburgh Roads and Streets Act 1862," I direct the Town-Clerk to transmit to the Clerk of the City Road Trust a certified list of the thirteen persons elected members of said trust as aforesaid.

—————, *Lord Provost,*
[or *Chief Magistrate, as the case may be.*]

28. *Form of Intimation by the Town-Clerk to the newly elected Councillors of their election, and requiring them to attend and declare whether they accept office.*

CITY CHAMBERS,

EDINBURGH,

November 18 .

SIR,

By direction of the Lord Provost, [or the Chief Magistrate, as the case may be] I hereby intimate to you, that you have been chosen a Councillor for the Ward of this City; and I require you to appear in the Council Chamber, here, to-morrow, being Thursday the instant, at 12 o'clock noon, when you will be required to declare whether you accept or decline accepting the office of Councillor. It will also be necessary that you produce evidence of your being a burghess of this City [or Burgh.]

I am further directed to intimate to you, that if you fail to attend, you will be held to have declined accepting the said office, unless you then transmit to the Meeting a sufficient written explanation, signed by yourself or your agent, of the cause of your absence, and intimating your acceptance. Your omission to produce evidence of your being a burgess of this City [or Burgh] will also be held, in terms of the Statute, to vacate your election, in the same manner as if you declined office.

I am, SIR,

Your most obedient Servant,

_____, *Town-Clerk.*

29. *Form of Minute of Meeting at which newly elected Councillors declare Acceptance of, and are sworn into, Office.*

(1.) *When the annual election of Councillors is completed.*

COUNCIL CHAMBERS,
EDINBURGH, November 18 .

Read declaration by the Lord Provost, [*or Chief Magistrate, as the case may be*] of yesterday's date, of the names of the Councillors and Members of the City of Edinburgh Road Trust upon whom the election had fallen.

Read letter from J. K. [*here design him*] who had been elected a Councillor for _____ Ward, stating that he was unable, by reason of indisposition, to attend in the Council Chamber to-day, but that he accepted of the office of Councillor to which he had been elected. Evidence was produced of his being a burgess of the City.

The Councillors under named, elected for the several Wards after specified, having been called on *seriatim*, declared their acceptance of the office of Councillor; produced evidence of their being Burgesses of the City; were inducted into office; and took and signed a declaration *de fidei administratione officii*.

I.—CALTON WARD.

A——— B———

II.—BROUGHTON WARD.

B——— C———

[*And in like manner as regards the other Wards.*]

The Annual Election of Councillors having been completed, the Lord Provost [*or Chief Magistrate, as the case may be*] directed the whole Council to be summoned to meet to-morrow, at twelve o'clock noon, to fill up the vacancies in the magistracy and office-bearers.

_____, Lord Provost.

(2.) *When the annual election is not completed by reason of a Councillor having been elected for two wards, or declining to accept office, or by reason of a double return.*

Read Declaration by the Lord Provost [*or Chief Magistrate, as the case may be*] of yesterday's date, of the names of the Councillors and Members of the City of Edinburgh Road Trust upon whom the election had fallen

Read the foregoing certificate by the Town-Clerk, from which it appeared, *inter alia*, that no person had been nominated in terms of "The Municipal Elections Amendment (Scotland) Act, 1868," to supply the vacancy in the Ward [*or that only one person had been nominated for election as a Councillor for the Ward, for which Ward two vacancies had to be supplied.*]

E. F. [*here design him*], having been elected a Councillor for Ward, and also for Ward, was required to state for which of the said Wards he intends to serve, whereupon he declared that he elected to serve for Ward.

Read letter from G. H. [*here design him*], who had been elected a Councillor for Ward, declining to accept the said office.

The Councillors under named, elected for the several wards after specified, having been called on *seriatim*, declared their acceptance of the office of Councillor; produced evidence of their being burgesses of the City, were inducted into office; and took and signed a declaration *de fidei administratione officii*.

I. CALTON WARD.

A———— B————

II. BROUGHTON WARD.

B———— C————

[*And in like manner as regards the other wards for which councillors have been elected, and who accept office.*]

IN RESPECT that the annual election of Councillors has not been completed, by reason of no person having been nominated for election as a Councillor for Ward, [*or by reason of only one person having been elected a Councillor for Ward, while two vacancies have to be supplied, leaving one vacancy still to be filled up; or, by reason of Councillor E. F. having been elected a Councillor for Ward, and also for Ward, and of his having declared that he elected to serve for Ward, whereby the vacancy in Ward still remains to be filled up; or by reason of G. H. who was elected a Councillor for Ward, having declined to accept the office or having failed to produce evidence of burgess-ship; or by reason of L. M. [*design him*] and N. O. [*design him*] having received an equal number of votes as Councillor for Ward,*]
—I. A. B., LORD PROVOST [*or Chief Magistrate, as the case may be*] OF THE CITY OF EDINBURGH, hereby, in

terms of the Acts of Parliament thereanent, APPOINT an election [or a new election, as the case may be] of a Councillor [or Councillors] for the Ward [or for the Ward and Ward as the case may be] to supply the vacancy [or vacancies] therein, to take place on the day of November current.¹

And I direct notice of the day of election so appointed to be affixed to the church doors of the burgh, in terms of the statute.

¹ [The day so fixed must be not more than four nor less than two days from the date of this minute. In fixing the day, it should be remembered that intimation of the names of candidates for election, in such circumstances, must be made to the town-clerk on or before four o'clock afternoon of the second lawful day immediately preceding that fixed for the election.]

A.B., Lord Provost,
[or Chief Magistrate, as
the case may be].

30. Form of Intimation by the Town-Clerk of a New Election.

BURGH OF EDINBURGH.

MUNICIPAL ELECTION.

18 .

In terms of the Act of Parliament [*Here insert specification of acts as in Form No. 1.*] THE TOWN-CLERK OF EDINBURGH hereby GIVES NOTICE that, in consequence of [*here specify the reason for a new election.*] THE LORD PROVOST HAS APPOINTED an election for a Councillor for the ward [*or a new election of councillors for the ward and ward.*] to take place, so far as may be necessary, on the day of November current, between the hours of eight o'clock A.M. and four o'clock P.M., at [*here specify the polling place or polling places.*]

THE TOWN-CLERK ALSO GIVES NOTICE that no person can be elected to the office of town councillor whose name is not intimated to him in terms of section 9 of "The Municipal Elections Amendment (Scotland) Act 1868," at the City Chambers, on or before four of the clock afternoon, of the instant, being the second lawful day immediately preceding that fixed for the election.

The remainder of the notice will be in similar terms to that given in Form No. 1.

_____, Town-Clerk,

CITY CHAMBERS,
EDINBURGH, November 18 .

31. *Form of Minute of Meeting of the Town Council reporting previous steps of Procedure, inducting the Dean of Guild and Convener of the Trades, fixing the Roll of the Council for the ensuing year, and electing Magistrates, &c.*

EDINBURGH, the day of November,
in the year eighteen hundred and
seventy .

[Here insert sederunt.]

The Lord Provost [or *Chief Magistrate, as the case may be*] stated that the annual Election of Councillors having been completed, the present meeting had been called for the purpose of filling up the vacancies in the Magistracy and Office Bearers; and for other business.

The minutes of the previous steps of the Election, dated and inst., were read.

Councillor J. K., who was elected a Councillor for Ward, but who was unable to attend at the meeting on instant, and who then accepted office by letter, and produced evidence of his being a Burgess of the city, being now present, was inducted into office, and took and signed a declaration *de fidei administratione officii*.

Certificates of the Election of Mr A. B., as Dean of Guild, and of Mr B. C., as Convener of the Trades, were produced and read, and they both being present, accepted of their offices, and took a declaration *de fidei administratione officii*, and the Dean of Guild took the declaration appointed by the Act 31 and 32 Vict. cap. 72.

Read Representation by the clerk to the effect that Councillors C. and D. had been elected for the Ward, under the provisions of "The Municipal Elections Amendment (Scotland) Act, 1870," without any poll having taken place; and also that Councillors E. and F. had been elected for the Ward by an equality of votes; and that it was necessary for the Town Council, under and in virtue of the powers conferred on them by the fifth section of "The Municipal Elections Amendment (Scotland) Act, 1870," to determine the order in which the councillors for each of the said wards should retire from the Town Council. Councillor C. thereupon stated that it had been arranged between Councillor D. and himself that he, the said Councillor C., should retire before Councillor D., and he craved the Council to approve of the arrangement. The Magistrates and Council approved of the said arrangement, and ordered and directed accordingly,—the retirement of Councillor C. before Councillor D. to be in the same way, and to have the same effect as if Councillor C. had been longer in office than Councillor D. Thereafter, it was moved by Bailie G.

H., that the Magistrates and Council do resolve and declare that Councillor F. shall retire from the Town Council as the representative of

Ward before Councillor E. The motion was seconded by Councillor J. K. Treasurer L., seconded by Councillor M., moved as an amendment, that the Magistrates and Council do resolve and declare that Councillor E. shall retire from the Town Council as the representative of

Ward before Councillor F. The vote having been taken as between the motion and the amendment, 15 members of Council voted for the motion, and 25 for the amendment. The amendment was therefore declared to be carried, and the Magistrates and Council accordingly resolved and declared that Councillor E. shall retire from the Town Council as the representative of

Ward before Councillor F., in the same way and to the same effect as if Councillor E. had been longer in office than Councillor F.

Read Representation by the Clerk of the following tenor:—
Edinburgh, November 18.—The Clerk begs to lay before the Council the following Roll of the Councillors of the different Wards:—

I.—CALTON WARD.

1870.—Councillor A. B.

1870.—Councillor B. C.

1871.—Councillor C. D.

II.—BROUGHTON WARD.

1869.—Bailie E.

1870.—Councillor F. G.

1871.—Councillor H. I.

[*And in like manner as regards the other Wards.*]

[*In preparing this roll, effect will of course be given to the resolution of the Council, as immediately above narrated, and the councillors for each ward will be arranged in the order in which they have to retire,—those who remain longest in office being placed lowest on the roll.*]

The Magistrates and Council declared the above to be the Roll of the Council, but, according to usage, the Magistrates and Office Bearers are to be called at the head of the Roll, and so placed in the sederunts of the Council.

The Clerk stated that the office of Lord Provost had become vacant by the retirement of X. Y., Esquire, in the order of rotation [*or resignation, as the case may be*]; and that there was one vacancy in the Magistracy, caused by the retirement, in the order of rotation, of Bailie K.

The Magistrates and Council having accordingly proceeded to fill up the vacant office of Lord Provost, on the motion of Bailie M.

seconded by Dean of Guild L., unanimously elected Councillor V. W. to be Lord Provost.

On the motion of Bailie K., seconded by Councillor L., the Magistrates and Council unanimously elected Councillor M. N. to be a Bailie of the City, and he having accepted of the Office, and having taken the declaration appointed by the Act 31 and 32 Vict., cap. 72, and also a declaration *de fidei administratione officii*, was thereupon invested with the insignia of his Office.

[*And so on as regards the other business.*]

APPENDIX No. XVII.

BURGH OF —————

MUNICIPAL ELECTION.

18 .

INSTRUCTIONS FOR TAKING THE POLL.

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*The Poll opens at Eight A.M., and closes at Four P.M.*  
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1. Before entering upon his duties, every Presiding Officer and Clerk must have made the Declaration of Secrecy prescribed by "The Ballot Act, 1872," in the presence of the Returning Officer or of a Justice of the Peace.¹

¹ See Rule 54 of the Ballot Act, 1872.

2. The Presiding Officers and Clerks should be at their posts at least Twenty Minutes before Eight o'clock A.M., so that they may be ready to begin punctually at Eight o'clock. Each Presiding Officer will have two Clerks, and will be provided with the following Articles, viz.:—

- (1.) A collection of the Acts regulating Municipal Elections.
- (2.) A Ballot Box and Cover, or materials for enclosing it in a separate sealed packet, in terms of Rule 29 of Schedule First of the Ballot Act, 1872. To each Ballot Box a label should be attached, having inscribed upon it the name or number of the Polling Place, and the number of the Polling Station at which it was used.
- (3.) Sealing Wax, with vestas and tapers, three small bottles of writing ink, and a supply of pens.

- (4.) Books containing Ballot Papers for Ordinary Votes, printed on *White paper*.
- (5.) A Book containing Ballot Papers for "Tendered Votes," printed on *Green paper*.
- (6.) An Instrument for marking the Ballot Papers by Stamping thereon the secret official mark.
- (7.) Pencils for each compartment, with which the Voters may mark their Votes on the Ballot Papers.
- (8.) A Copy of the Register of Voters for the particular Ward, certified by the Town-Clerk.
- (9.) Two Lists or Sheets, titled "List of Votes marked by the Presiding Officer," having annexed a Schedule, titled "Statement of Number of Voters whose Votes are marked by the Presiding Officer."
- (10.) Two Lists or Sheets, titled "The Tendered Votes List."
- (11.) Two Sheets, entitled "The Ballot Paper Account."
- (12.) Fifty printed Declarations of inability to read.
- (13.) Fifty printed Declarations that the person claiming to Vote is the individual described in the Municipal Register.
- (14.) Six copies of each of the Placards—(1.) Directions for the guidance of voters; (2.) Placard intimating arrangements for polling; and (3.) Placard to be posted up above each polling station, with reference to Placard (2).
- (15.) Six large cloth Envelopes in which to seal up papers.

3. Each Presiding Officer should be provided with a private seal, wherewith to seal up the Ballot Box and Papers.¹

¹ See Rules 23 and 29 of the Ballot Act.

4. In so far as the arrangements for Voting in each Polling Station have reference to the letters of the Alphabet with which the surnames of the Voters begin, they are explained in the Placards which have been ordered to be posted up outside and inside of the Polling Station, and of which copies accompany these Instructions.

5. Each Presiding Officer should see, before the Poll

begins, that copies of these Placards are posted up outside and inside of the Polling Station under his charge. The Directions to Voters in voting should also be posted up in each compartment, and the Presiding Officer should see that this is done.

6. No person must be admitted to vote at any Polling Station except the one allotted to him.¹

¹ See Rule 18 of the Ballot Act.

7. Before the Poll commences, the Presiding Officer should regulate the number of Electors to be admitted into the Polling Station at a time, and should instruct the Police Constables on duty at the Station accordingly. It is expedient that not more Electors should be within the Station at one time than there are compartments in the Station; and all other persons should be excluded, except the Clerks, the Candidates, the Agents of Candidates, [and the Constables on duty. Intimation of the names and addresses of the Agents appointed by Candidates to attend the Poll must be given to the Provost or Chief Magistrate one clear day at least before the opening of the Poll, and the Declaration of Secrecy must be administered to every Agent before he is admitted to the Polling Station. Each Agent whose appointment has been so intimated, and who has taken the Declaration of Secrecy, will receive a Certificate under the hand of the Provost or Chief Magistrate before whom the declaration is taken, and, on production of it, the Presiding Officer will admit him into the Polling Station.¹

¹ See Rule 21 of the Ballot Act.

8. Only one Agent for each Candidate should be allowed into each Polling Station, and each Agent, before he is admitted to a Polling Station, must produce written authority from the Provost or Chief Magistrate to attend the Polling Station as Agent for a Candidate, and must satisfy the Presiding Officer that he has taken the Oath of Secrecy.¹

¹ See Rule 54 of the Ballot Act.

9. The Presiding Officer should have before him the Ballot Box, the Stamping Instrument, and the Lists or Sheets above enumerated, and should be placed so as to command a full view of the Compartments in the Polling

Station under his charge. One of the Clerks should have before him the Copy of the Register of Voters for the Ward; and the other Clerk should have before him the Books containing the Ballot Papers. The Clerks should be so placed that the Presiding Officer may overlook their work.

10. Just before the commencement of the Poll, the Presiding Officer must show the Ballot Box empty to such persons, if any, as may be present in the Polling Station, so that they may see that it is empty, and must then lock it up, tie the strings which are attached to it for this purpose, and place his seal upon the knots in such a manner as to prevent the box being opened without breaking the seal—the aperture in the top of the box being left open for the receipt of the Ballot Papers. The Ballot Box should, thereafter, be placed in view of the Presiding Officer for the receipt of Ballot Papers, and be kept so locked and sealed.¹

¹ See Rule 23 of the Ballot Act.

11. When an Elector appears, the Clerk who has before him the Copy of the Register of Voters should ascertain his name and exact address, and look up the entry applicable to him in the Register. Having found it, he must call out the number, name, and description of the Elector, as stated in the copy of the Register, and put a distinct mark in the Register against the number of the Elector, to denote that he has received a Ballot Paper, but without showing the particular Ballot Paper which he has received. As there may be many persons of the same name in each Ward, great care will be required to secure accuracy.¹

¹ See Rule 24 of the Ballot Act.

12. The other Clerk, who has before him the Books containing the Ballot Papers must, whenever the number of the Elector is so called out, write the number on the Counterfoil, repeating the number aloud so as to ensure accuracy, after which he must detach the Ballot Paper from the Counterfoil, and hand the paper to the Presiding Officer.¹

See Rule 24 of the Ballot Act.

13. The Presiding Officer must then mark the Ballot Paper, but only once on each side with the official mark.

If a perforating or embossing stamp be used, one impression will be sufficient, as the mark will be visible on both sides. The paper properly marked should then be handed to the Voter, who will forthwith proceed into one of the Compartments in the Polling Station, and there secretly mark the paper by putting a X opposite the names of the party or parties for whom he votes, then fold the paper up so as to conceal his vote, and after showing the official mark on the back thereof to the Presiding Officer, deposit the paper, so folded up, in the Ballot Box in the presence of the Presiding Officer and immediately leave the Station.¹

¹ Rules 24 and 25 of the Ballot Act.

14. Though the Ballot Act requires the Voter to mark his vote *secretly*, and to fold his Ballot Paper so as to *conceal his vote*, and thereafter to place the paper in the Ballot Box in the presence of the Presiding Officer, it does not empower the Presiding Officer to refuse to receive the Voting Paper of an Elector who violates the secrecy thus enjoined. He should therefore allow the Ballot Paper to be deposited in the Ballot Box.

15. Though the Ballot Act declares that any Ballot Paper which has not on its back the official mark, or on which votes are given to more Candidates than the Voter is entitled to vote for, or on which anything except the number on the back is written or marked by which the Voter can be identified, shall be void and not counted, the Presiding Officer must allow the objectionable paper to be deposited in the Ballot Box, leaving it to be dealt with by the Provost or Chief Magistrate in counting the votes.

16. On the application of any Voter who is incapacitated by blindness or other physical cause from voting in the manner prescribed by the Ballot Act, or of any Voter who makes the Statutory Declaration of inability to read, and which must be made in the way and manner hereinafter appointed, the Presiding Officer must, in the presence of the Candidates, or of the Agents of the Candidates, cause the vote of such Voter to be marked on a Ballot Paper (*white paper*), in manner directed by such Voter, and the Ballot Paper to be placed in the Ballot Box, and the name and number on the Register of Voters of every voter whose vote is so marked, and the reason

why it is so marked, must be entered on the List called "The List of Votes marked by the Presiding Officer."

¹ See Rule 26 of the Ballot Act.

17. The Declaration of inability to read must be made by the Voter at the the time of polling, before the Presiding Officer, who must attest it in the manner pointed out in the printed form. The Declaration must be given to the Presiding Officer at the time of voting.¹

¹ See Rule 26 of the Ballot Act.

18. As the purpose of the Ballot Act is to secure secrecy in voting, and as the votes of those who cannot read are appointed to be marked in the presence of the Agents of the Candidates, without mentioning any other persons, the Presiding Officer must, before taking such votes, cause the Polling-Station to be cleared of all other Voters. In all cases, candidates have the same rights as the Agents appointed by them, and may consequently be present at marking such votes.

19. If a person, representing himself to be a particular Elector named on the Register, applies for a Ballot Paper after another person has voted as such Elector, the applicant, upon taking the Declaration undernoted, will be entitled to mark a Ballot Paper in the same manner as any other Voter, *but the Ballot Paper to be used in such case must be that printed on green paper, and must not be put into the Ballot Box*, but must be given to the Presiding Officer, and indorsed by him with the name of the Voter and his number in the Register, and set apart in a separate packet. The name of the Voter and his number on the Register must then be entered in the "*Tendered Votes List*."¹

¹ See Rule 27 of the Ballot Act.

20. When an Elector, or person professing to be an Elector, who claims to vote, is required by any other Elector on the Register to make the Declaration prescribed by Schedule (A.) of "The Municipal Elections Amendment (Scotland) Act, 1868," the Declaration must be administered by the Presiding Officer, in the following terms:—"I, A. B., declare that I am the individual described in the Register now in force for the Ward of the Burgh of —————, as A. B. (*here insert description in the same words as in the Register*), and that I

have not already voted at this Election." This Declaration must be signed by the person by whom it is made, and by the Presiding Officer. If the person making the Declaration cannot write, or alleges that he cannot write, the Presiding Officer should require the person to affix his mark to the Declaration, and should afterwards certify the fact in the manner pointed out in the printed form.

21. If a Voter inadvertently deals with his Ballot Paper in such a manner that it cannot be conveniently used as a Ballot Paper, he may, on delivering the Paper so inadvertently dealt with to the Presiding Officer, and proving the fact of the advertence to the satisfaction of the Presiding Officer, obtain another Ballot Paper in place of the one so delivered up.¹

¹ See Rule 28 of the Ballot Act.

22. The new Ballot Paper must be taken from the Book of Ballot Papers in the ordinary course, the number of the Elector on the Register being marked on the counterfoil as if he were getting a Paper for the first time. But before the new Paper is marked with the official mark and handed to the Elector, the Ballot Paper delivered up must be cancelled by writing the word "spoilt" across its face and upon its counterfoil, and a reference must be made on that counterfoil to the number of the new Ballot Paper issued.

23. The spoilt Ballot Papers must be carefully preserved and accounted for, with the other Ballot Papers, in "The Ballot Paper Account."

24. The Presiding Officer may do, by the Clerks appointed to assist him, any act which he is required or authorised to do by the Ballot Act at a Polling Station, except ordering the arrest, exclusion, or ejection from the Polling Station of any person.¹

¹ See Rule 50 of the Ballot Act.

25. If any person misconducts himself in the Polling Station, or fails to obey the lawful orders of the Presiding Officer, he may immediately, by order of the Presiding Officer, be removed from the Polling Station by any Constable in or near that Station, or any other person authorised in writing by the Returning Officer to remove him; and the person so removed shall not, unless with the permission of the Presiding Officer, again be allowed

to enter the Polling Station during the day. Any person so removed, if charged with the commission in such Polling Station of any offence, may be kept in custody until he can be brought before a Justice of the Peace. But the powers referred to in this Article must not be exercised so as to prevent any Elector, who is otherwise entitled to vote at any Polling Station, from having an opportunity of voting at such Station.¹

¹ See Section 9 of the Ballot Act.

26. Any Presiding Officer, and any Clerk appointed by the Returning Officer to attend at a Polling Station, is empowered by the Ballot Act to ask the questions and administer the oath authorized by law to be asked of and administered to Voters.¹

¹ See Section 10 of the Ballot Act.

27. Every person who—

- (1.) Forges or counterfeits or fraudulently defaces or fraudulently destroys any Ballot Paper or Official Mark on any Ballot Paper; or¹
- (2.) Without due authority supplies any Ballot Paper to any person; or
- (3.) Fraudulently puts into any Ballot Box any paper other than the Ballot Paper which he is authorized by law to put in; or
- (4.) Fraudulently takes out of the Polling Station any Ballot Paper; or
- (5.) Without due authority destroys, takes, opens, or otherwise interferes with any Ballot Box or packet of Ballot Papers then in use for the purposes of Election;

will be guilty of a misdemeanour, and be liable, if he is a Returning Officer, or an Officer or Clerk in attendance at a Polling Station, to imprisonment for any term not exceeding two years, with or without hard labour; and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour.

Any attempt to commit any offence above specified is punishable in the manner in which the offence itself is punishable.

¹ See Section 3 of the Ballot Act.

28. Every Officer, Clerk, and Agent in attendance at a Polling Station must maintain and aid in maintaining the

secrecy of the voting in such Station, and must not communicate, except for some purpose authorised by law, before the Poll is closed, to any person any information as to the name or number on the Register of Voters of any Elector who has or has not applied for a Ballot Paper or voted at that Station, or as to the Official Mark ; and no such Officer, Clerk, or Agent, and no person whosoever, must interfere with or attempt to interfere with a Voter when marking his vote, or otherwise attempt to obtain in the Polling Station information as to the Candidate for whom any Voter in such Station is about to vote or has voted, or communicate at any time to any person any information obtained in a Polling Station as to the Candidate for whom any Voter in such Station is about to vote or has voted, or as to the number on the back of the Ballot Paper given to any Voter at such Station. No person shall directly or indirectly induce any Voter to display his Ballot Paper after he has marked the same, so as to make known to any person the name of the Candidate for or against whom he has so marked his vote. Every person who acts in contravention of the provisions of this section will be liable, on summary conviction before two Justices of the Peace, to imprisonment for any term not exceeding six months, with or without hard labour.¹

¹ See Section 4 of the Ballot Act.

29. Every Returning Officer, Presiding Officer, and Clerk who is guilty of any wilful misfeasance or any wilful act or omission in contravention of the Ballot Act will, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding one hundred pounds.¹

See Section 11 of the Ballot Act.

30. For all purposes of the laws relating to Municipal Elections, a person will be deemed to be guilty of the offence of personation who, at a Municipal Election, applies for a Ballot Paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who, having voted once at any such Election, applies at the same Election for a Ballot Paper in his own name. The offence of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person is, by

the Ballot Act, 1872, declared to be a crime and offence, and the rules of the law of Scotland, with respect to apprehension, detention, precognition, commitment, and bail, are applicable thereto, and any person accused thereof may be brought to trial in the Court of Justiciary, whether in Edinburgh or on Circuit, at the instance of the Lord Advocate, or before the Sheriff Court at the instance of the Procurator-Fiscal. Any person convicted of personation will be punished by imprisonment for a term not exceeding two years, together with hard labour.¹

¹ See Section 24 of the Ballot Act.

31. The Poll must be closed at Four o'clock P.M.

32. A Voter who happens to be in a Polling Station when Four o'clock arrives, is not entitled to receive a Ballot Paper after that hour. But if, previous to Four o'clock, he has received a Ballot Paper, and has not unduly delayed to mark and deposit it, he may after Four o'clock mark and deposit it.

33. As soon as practicable after the close of the Poll, the Presiding Officer must, in the presence of such of the Candidates as may be present, or of the Agents of such of the Candidates as may be present, make up into *separate* packets, sealed with his own seal and the seals of such candidates, or of the Agents of the Candidates, as desire to affix their seals:¹—

¹ Rule 29 of the Ballot Act.

- (1.) The Ballot Box, unopened, but with the key attached, the aperture on the top being closed and sealed up, so as to prevent the introduction of additional Ballot Papers. To each Ballot Box a label should be attached, having inscribed upon it the name of the Ward, and the number of the Polling Station in which it was used.
- (2.) The Unused and Spoilt Ballot Papers placed together. At the close of the Poll the stitching of the Ballot Book in use must be cut so as to admit of all the unused Ballot Papers, with their counterfoils, being removed from the counterfoils of the used Ballot Papers. These unused Ballot Papers and Counterfoils, with any Books of Ballot Papers which have not been begun to be

used when the Poll is closed, must then be sealed up with the spoiled Ballot Papers, leaving merely the counterfoils of the used and the counterfoils of the spoilt Ballot Papers to be sealed up together, as directed in sub-section (5.) below. These unused Ballot Papers remaining in the Ballot Books must be detached from the Counterfoils and put in this packet.

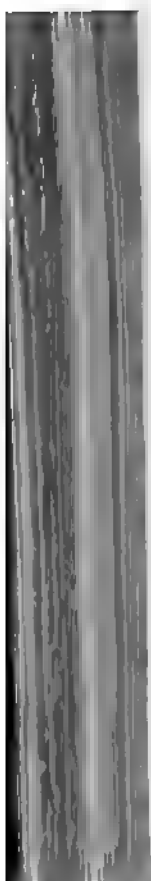
- (3.) The Tendered Ballot Papers.
- (4.) The marked copies of the Register of Voters.
- (5.) The Counterfoils of the Ballot Papers.
- (6.) The Tendered Votes List, and the List of Votes marked by the Presiding Officer, and a statement of the number of the Voters whose votes are so marked by the Presiding Officer under the heads "*Physical Incapacity*," and "*Unable to Read*," and the declarations of inability to read;

And should personally deliver such packets to the Lord Provost or Chief Magistrate, as returning Officer, as soon as possible. Each packet should specify the Polling Place and Polling Station whence it has come, and the contents of the packet.

34. The above Packets must be accompanied by a statement made by the Presiding Officer, showing the number of Ballot Papers entrusted to him, and accounting for them under the heads of Ballot Papers in the Ballot Box, Unused, Spoilt, and Tendered Ballot Papers. This statement should be put in a separate Envelope, having the words, "Ballot Paper Account," endorsed upon it.¹

¹ See Rule 30 of the Ballot Act.

35. The Stamping Instrument must also be sent with the above packets to the Returning Officer.



I N D E X.



I N D E X.

The references to the Additions and Corrections are marked within parentheses, thus—(1), (2), etc.,—the number indicating the particular Addition or Correction.

The references to the Appendix are marked within square brackets, thus—[1], [2], etc.,—the number indicating the page of the Appendix.

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